

**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**JOSEPH ROSENTHAL,**

**Plaintiff in Error,**

**vs.**

**THE UNITED STATES OF AMERICA,**

**Defendant in Error.**

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**Transcript of Record.**

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**Upon Writ of Error to the Northern Division of  
the United States District Court of the  
Northern District of California.**

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**FILED**

**APR - 8 1921**

**F. D. MONCKTON**



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOSEPH ROSENTHAL,

Plaintiff in Error,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Francisco, Cal.

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For Defendant and Plaintiff in Error:

JOSEPH E. BIEN, Esq., and JOHN B. CLAYBERG, Esq., San Francisco, Calif.

District Court of the United States, Northern District of California, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

## **Praeipice for Transcript on Writ of Error.**

To the Clerk of the Above-entitled Court:

You are hereby directed to prepare the transcript on return to a certain writ of error, issued on January 20, 1921, to review a final judgment heretofore, and on December 2, 1920, entered against defendant, Joseph Rosenthal, and to have the same in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on March 28, 1921.

Said transcript shall consist of the following papers now on file in your office in the above-entitled action:

1. Indictment.
2. Plea of Joseph Rosenthal.
3. Verdict.

31½. Motion for new trial.

4. Judgment.

5. Assignment of error.

6. Petition for writ of error.

7. Order directing issue of writ of error.

8. Supersedeas or bail bond.

9. Cost bond.

10. Bill of exceptions.

11. Praecept and stipulation for transcript.

12. Clerk's certificate.

Dated this 9th day of March, 1921.

JOS. E. BIEN,

JNO. B. CLAYBERG,

Attorneys for Plaintiff in Error, Joseph Rosenthal.

It is hereby stipulated and agreed that the transcript on the return to the writ of error heretofore, and on January 20, 1921, issued from the final judgment in said action, shall be [1\*] made up of the papers and files specified in the foregoing Praecept.

Dated this 9th day of March, 1921.

FRANK M. SILVA,

U. S. District Attorney.

JOS. E. BIEN,

JNO. B. CLAYBERG,

Attorneys for Plaintiff in Error, Joseph Rosenthal.

Approved:

HUNT,

Judge.

[Endorsed]: Filed March 9, 1921. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [2]

\*Page-number appearing at foot of page of original certified Transcript of Record.

In the Northern Division of the United States District Court for the Northern District of California, First Division.

**Indictment.**

Violation Act. Feb. 13th, 1913.

At a stated term of said Court begun and holden in the City of Sacramento, in the County of Sacramento, in the Northern Division of the Northern District of California, on the second Monday of April, in the year of our Lord one thousand nine hundred and twenty,

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: THAT

JOSEPH ROSENTHAL, MORRIS ROSENTHAL and ARTHUR F. FITCH, hereinafter called the defendants, heretofore, to wit, on or about the tenth day of November, A. D. 1919, at Sacramento, in the county of Sacramento, in the Northern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously buy and receive thirty-nine (39) cases containing 5,000 cigarettes each, which said 39 cases of cigarettes were of the approximate value of \$1,462.50 in lawful money of the United States, and which said 39 cases of cigarettes had theretofore been unlawfully stolen, taken and carried away from a certain railroad car of the Southern Pacific Company, to wit, Car C. E. & I. 35132, by M. H. Young and F. W. Laveque, the said 39 cases of cigarettes at the time they were so



stolen, taken and carried away constituting a part of a shipment of freight in interstate commerce over the lines of railroad of the said Southern Pacific Company, and consigned by John Bollman & Company of San Francisco, California, to Coast Cigar Company, Lang & Company, Hart Cigar Company, and T. W. Jenkins, all of Portland, [3] Oregon; that at the time and place aforesaid, the said defendants then and there well knew that the said 39 cases containing 5,000 cigarettes each had been theretofore stolen, taken and carried away from said railroad car, as aforesaid.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided,

## SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

JOSEPH ROSENTHAL, MORRIS ROSENTHAL, and ARTHUR F. FITCH, hereinafter called the defendants, heretofore, to wit, on or about the tenth day of November, A. D. 1919, at Sacramento, in the county of Sacramento, in the Northern Division of the Northern District of California then and there being, did then and there unlawfully, wilfully, knowingly and feloniously receive and have in their possession, knowing the same to have been stolen from a freight-car of the Southern Pacific Company, to wit, Car C. E. & I. 35132, certain goods and chattels, to wit, thirty-nine (39) cases containing 5,000 cigarettes each, of the ap-



proximate value of \$1,462.50 in lawful money of the United States, which said goods and chattels were then and there a part of an interstate shipment of freight over the lines of railroad of the said Southern Pacific Company, and were then and there in transportation over said lines of railroad from John Bollman & Company of San Francisco, California, to Coast Cigar Company, Lang & Company, Hart Cigar Company, and T. W. Jenkins, all of Portland, Oregon, in interstate commerce. [4]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

ANNETTE ABBOTT ADAMS,

United States Attorney.

[Endorsed]: Bond 5,000.00. No. 586. United States District Court, Northern Division, Northern District of California, First Division. The United States vs. Joseph Rosenthal, Morris Rosenthal and Arthur F. Fitch. Indictment for Buying, Receiving and Having in Possession Goods Stolen from Interstate Shipment of Freight. A True Bill. W. E. J. Baughman, Foreman Grand Jury. Presented in Open Court and Ordered Filed Apr. 28, 1920. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. Annette Abbott Adams, U. S. Attorney.

May 5, 1920. Each Deft. arrg., each plead Not Guilty.

Nov. 30, 1920. Trial. Contd. to Dec. 1, 1920.

Dec. 1, 1920. Trial resumed. Jury returned vdict. Not Guilty on both counts as to Defts. Morris Rosenthal and Arthur F. Fitch; not guilty on 1st count and guilty on 2d count as to Deft. Joseph Rosenthal.

Dec. 2, 1920. Deft. Joseph Rosenthal sentenced to be imprisoned period one (1) year and one (1) day U. S. Penitentiary, McNeil Island, State of Washington. [5]

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At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 5th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 586.

UNITED STATES OF AMERICA,

vs.

JOSEPH ROSENTHAL, MORRIS ROSEN-  
THAL and ARTHUR F. FITCH.

**Minutes of Court—May 5th, 1921—Arraignment and  
Plea.**

This cause came on regularly this day for the arraignment of the defendants. Said defendants were present with their counsel. B. F. Geis, Assistant United States Attorney, appeared for the United States. On motion of Mr. Geis and an

order of Court, said defendants were duly arraigned upon the indictment filed herein, stated their true names to be as contained therein, and plead not guilty of the offense in said indictment alleged, which plea the Court ORDERED be and the same is hereby entered. On motion of Mr. Geis, FURTHER ORDERED that this cause be and the same is hereby continued to October 4, 1920, to be set for trial. [6]

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In the Northern Division of the United States District Court for the Northern District of California.

No. 586.

THE UNITED STATES OF AMERICA

vs.

JOSEPH ROSENTHAL, MORRIS ROSENTHAL and ARTHUR F. FITCH.

**Verdict.**

We, the Jury, find the defendants at the bar as follows:

On the first count of the indictment:

JOSEPH ROSENTHAL not Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

On the second count of the indictment:

JOSEPH ROSENTHAL is Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

ALCY E. DAVENPORT,  
Foreman.

[Endorsed]: Filed at 7:41 o'clock P. M. Dec. 1, 1920. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [7]

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At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 2d day of December, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable EDWARD E. CUSHMAN, District Judge for the Western District of Washington, designated to hold and holding this court.

No. 586.

UNITED STATES OF AMERICA.

vs.

JOSEPH ROSENTHAL.

**Minutes of Court—December 2, 1920—Motion for  
New Trial and Pronouncing of Judgment.**

This cause came on regularly this day for entry of judgment against the defendant Joseph Rosenthal. The defendant was present with E. S. Wachhorst and R. Porter Ashe, his attorneys. R. B. McMillan and Wilford H. Tully, Assistant United States Attorneys, appeared for the United States. Defendant Joseph Rosenthal was called for judgment and asked if he had any legal cause to show why judgment should not be pronounced against him upon the second count in the indictment herein.

Mr. Wachhorst on behalf of said defendant made a motion for new trial, which motion the Court ORDERED be and the same is hereby denied. No sufficient cause being shown or appearing to the Court why judgment should not be entered, the Court ORDERED that said defendant Joseph Rosenthal, for the offense of which he stands convicted on the second count of said indictment, be imprisoned for the period of one (1) year and one (1) day in the United States Penitentiary at McNeil Island, State of Washington. Mr. Wachhorst gave notice of appeal, and the Court FURTHER ORDERED that bond of said defendant Joseph Rosenthal pending appeal be and the same is hereby set in the amount of three thousand (\$3,000) dollars. [8]

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In the District Court of the United States, for the  
Northern District of California.

No. 586.

Acquitted on Indt. for Viol. Act Feb. 13, 1913,  
Morris Rosenthal and Arthur F. Fitch, Both  
Counts; Joseph Rosenthal, 1st Count.

THE UNITED STATES OF AMERICA.

vs.

JOSEPH ROSENTHAL, MORRIS ROSEN-  
THAL and ARTHUR F. FITCH.

**Judgment on Verdict of Not Guilty.**

This cause came on regularly for trial on the

30th day of November, 1920, R. B. McMillan and Wilford H. Tully, Esquires, Assistant United States Attorneys, appearing on behalf of the United States, and E. S. Wachhorst and R. Porter Ashe, Esquires, as attorneys for defendants.

Thereupon a jury of twelve persons was duly accepted, impaneled, and sworn to try said defendants.

WHEREUPON, after hearing the evidence and the instructions of the Court, arguments being waived, the case was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, where it was stipulated that all were present, and upon being asked if they had agreed upon a verdict, rendered the following written verdict, which was by the Court ordered recorded in the minutes of the Court and which verdict is as follows:

“We, the Jury, find the defendants at the bar as follows:

“On the first count of the indictment:

“JOSEPH ROSENTHAL not Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

“On the second count of the indictment:

“JOSEPH ROSENTHAL is Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

“ALCY E. DAVENPORT,  
Foreman.”

IT IS THEREFORE ORDERED AND ADJUDGED:



That the said Morris Rosenthal and Arthur F. Fitch be discharged [9] from custody, and that they go hence without day; and

That the said Joseph Rosenthal be, on the first count of the indictment filed herein, discharged from custody and that on said first count of said indictment he go hence without day.

Judgment entered this 2d day of December, 1920.

WALTER B. MALING,

Clerk.

By Thomas J. Franklin,  
Deputy Clerk. [10]

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In the Northern Division of the United States District Court for the Northern District of California.

No. 586.

Convicted of Violation Act Feb. 13, 1913.

THE UNITED STATES OF AMERICA

vs.

JOSEPH ROSENTHAL.

**Judgment on Verdict of Guilty.**

R. B. McMillan and Wilford H. Tully, Assistant United States Attorneys, and the defendant Joseph Rosenthal with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 28th day of April, 1920, charging him with the crime of Violation of the Act of Feb. 13, 1913; of his arraignment and plea of Not Guilty; of his trial and the verdict

of the Jury on the 1st day of December, 1920, to wit:

“We, the Jury, find the defendants at the bar as follows:

“On the first count of the indictment:

“JOSEPH ROSENTHAL not Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

“On the second count of the indictment:

“JOSEPH ROSENTHAL is Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

“ALCY E. DAVENPORT,

“Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein on the second count of said indictment, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial, thereupon the Court rendered its judgment:

THAT, WHEREAS, the said Joseph Rosenthal having been duly convicted in this court of the crime of Violation of the Act of Feb. 13, 1913;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Joseph Rosenthal, on the second count of said indictment, be imprisoned [11] for the period of one (1) year and one (1) day in the United States Penitentiary at McNeil Island, State of Washington.



Judgment entered this 2d day of December, A. D. 1920.

WALTER B. MALING,

Clerk.

By Thomas J. Franklin,

Deputy Clerk. [12]

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In the District Court of the United States in and for the Northern District of California, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

**Assignment of Errors.**

And now comes Joseph Rosenthal, the plaintiff in error, and in connection of his petition for a writ of error, says:

That in the record proceedings and judgment aforesaid, error has intervened to his prejudice, to wit:

First: The Court erred in giving and entering judgment against plaintiff in error on the verdict entered herein, because

(a) The second count of said indictment states no offense under the statutes of the United States.

(b) The jury by which said cause was tried found all the defendants charged, not guilty upon the first count of said indictment. It was thereby

determined that plaintiff in error was not guilty of buying or receiving the cigarettes described in said first count, knowing them to have been stolen.

(c) The jury by which the cause was tried found all the defendants charged under the second count of said indictment, not guilty, except the plaintiff in error, who was found guilty. The only evidence presented the said jury on the trial of said cause conclusively shows that plaintiff in error actually bought said cigarettes solely for defendant, [13] Maurice Rosenthal, as his agent and employee; that the same were received by, retained and held in the possession of the said Maurice Rosenthal, and that none of the same were ever received by, or ever had or held in the possession of, the plaintiff in error.

(d) There was no substantial evidence introduced at the trial of said action sufficient to sustain the conviction of plaintiff in error.

(e) There was no evidence introduced on the trial of said action showing, or tending to show, that said plaintiff in error had ever bought, received or had in his possession, any of the cigarettes mentioned and described in said second count of said indictment, knowing the same to have been stolen.

(f) By the verdict of acquittal of each and all of the defendants under the first count of said indictment, said jury determined that none of the several defendants had then and there unlawfully, willfully, knowingly, feloniously or otherwise, bought and received the cigarettes described in said count, knowing the same to have been stolen, and

the same thereby became tantamount to an acquittal of all said defendants on and under said second count of said indictment.

(g) The verdict of the jury is inconsistent in that it found all of the defendants not guilty of buying and receiving certain cigarettes described in the indictment constituting a part of an interstate commerce shipment, knowing the same to have been stolen, and also found under the second count of said indictment that plaintiff in error received and had in his possession the same cigarettes, knowing them to be stolen.

(h) It appears from all the evidence introduced at said trial that the verdict is at least as consistent with [14] the innocence of the accused as with his guilt.

Second. The court *error* in refusing to grant plaintiff in error a new trial because

(a) The second count of said indictment states no offense under the statutes of the United States.

(b) The jury by which said cause was tried found all the defendants charged, not guilty upon the first count of said indictment. It was thereby determined that plaintiff in error was not guilty of buying or receiving the cigarettes described in said first count, knowing them to have been stolen.

(c) The jury by which the cause was tried found all the defendants charged under the second count of said indictment, not guilty, except the plaintiff in error, who was found guilty. The only evidence presented the said jury on the trial of said cause conclusively shows that plaintiff in error actually

bought said cigarettes solely for defendant, Maurice Rosenthal, as his agent and employee; that the same were received by, retained and held in the possession of the said Maurice Rosenthal, and that none of the same were ever received by, or ever had or held in the possession of, the plaintiff in error.

(d) There was no substantial evidence introduced at the trial of said action sufficient to sustain the conviction of plaintiff in error.

(e) There was no evidence introduced on the trial of said action showing, or tending to show, that said plaintiff in error had ever bought, received or had in his possession, any of the cigarettes mentioned and described in said second count of said indictment, knowing the same to have been stolen.

(f) By the verdict of acquittal of each and all of the defendants under the first count of said indictment, said jury determined that none of the several defendants [15] had then and there unlawfully, willfully, knowingly, feloniously or otherwise, bought and received the cigarettes described in said count, knowing the same to have been stolen, and the same thereby became tantamount to an acquittal of all said defendants on and under said second count of said indictment.

(g) The verdict of the jury is inconsistent in that it found all of the defendants not guilty of buying and receiving certain cigarettes described in the indictment constituting a part of an interstate commerce shipment, knowing the same to have been stolen, and also found under the second count of said indictment that plaintiff in error received and had

in his possession the same cigarettes, knowing them to be stolen.

(h) It appears from all the evidence introduced at said trial that the verdict is at least as consistent with the innocence of the accused as with his guilt.

WHEREFORE, said plaintiff in error prays that said judgment of the District Court of the United States may be reversed and held for naught.

JOS. E. BIEN,  
JNO. B. CLAYBERG,  
Attorney for Petitioner.

[Endorsed]: Filed Jan. 20, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [16].

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In the District Court of the United States in and for  
the Northern District of California, Northern  
Division.

(No. 586.)

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

JOSEPH ROSENTHAL,  
Defendant.

**Petition for Writ of Error and Supersedeas.**

To the Honorable Judges of the District Court of the  
United States, in the *District of Northern Cali-*  
*fornia*, Northern Division.

And now comes Joseph Rosenthal, the defendant  
in the above-entitled cause, and feeling himself ag-

grieved by the verdict of the jury and the judgment of the District Court of the United States for the Northern District of California, Northern Division, entered on the second day of December, 1920, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit, to the District Court of the United States for the Northern District of California, Northern Division; that said writ of error may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending final disposition of said writ of error. The assignment of error is filed with this petition.

JOSEPH ROSENTHAL.

By JNO. B. CLAYBERG,  
His Attorney.

[Endorsed]: Filed Jan. 20, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

---

In the District Court of the United States in and for  
the Northern District of California, Northern  
Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.



**Order for Issuance of Writ of Error.**

Let a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Northern District of California, Northern Division, as prayed for in the petition of the said Joseph Rosenthal; and that a citation be issued to the defendant in error.

And, it now appearing that a citation has been served in the cause, it is now ordered that the writ of error allowed, as above stated, operate as supersedeas and the defendant be admitted to bail upon furnishing a bond in the penal sum of three thousand dollars, condition according to law to be approved by me.

WM. H. HUNT,  
Judge.

[Endorsed]: Filed Jan. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

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**Supersedeas Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that I, Joseph Rosenthal, of the city and county of San Francisco, State of California, as principal, and Maurice Rosenthal and Moses Hartman, both of the city and county of San Francisco, State of California, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Three Thousand Dollars (\$3,000.) to be paid to the United States of America, to which payment well and truly made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of January in the year of our Lord nineteen hundred and twenty-one.

WHEREAS, lately, on the 2d day of December, 1920, at the November Term of the District Court of the United States for the Northern District of California, Northern Division, in a cause pending in said court between the United States of America, Plaintiff, and Joseph Rosenthal, Defendant, a judgment and sentence was rendered against said Joseph Rosenthal and said Joseph Rosenthal obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing the United States of America to be and appear in the said court thirty (30) days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such that if the said Joseph Rosenthal shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court, until said cause shall be finally disposed of and shall abide by and obey the judgment and all orders made by the said Court of Appeals in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if



the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States [19] for the Northern District of California, Northern Division, such day or days as may be appointed for a re-trial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall not be reversed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise, to remain in full force, virtue and effect.

JOSEPH ROSENTHAL. (Seal)

MAURICE ROSENTHAL. (Seal)

MOSES HARTMAN. (Seal)

Approved by:

WM. H. HUNT,

Judge.

Dated January 21st, 1921.

State of California,

City and County of San Francisco, ss.

MAURICE ROSENTHAL and MOSES HARTMAN, the persons whose names are subscribed as sureties to the above bail bond, being severally sworn, each for himself, says:

That he is one of the sureties named in the above bail bond; that he is a resident and householder within the city and county of San Francisco, and that he is worth the amount specified in said bail bond as the penalty thereof over and above all his just debts

and liabilities exclusive of property exempt from execution.

MAURICE ROSENTHAL.  
MOSES HARTMAN.

Subscribed and sworn to before me this 21st day of January, 1921.

[Seal] LOUISE BEARDEN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jan. 21, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

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**Cost Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, Joseph Rosenthal, of the city and county of  
San Francisco, State of California, as principal and  
Maurice Rosenthal and Moses Hartman, both of the  
city and county of San Francisco, State of Cali-  
fornia, as sureties, are held and firmly bound unto  
United States of America in the full and just sum of  
Three Hundred (300) Dollars to be paid to the said  
United States of America; to which payment, well  
and truly to be made, we bind ourselves, our heirs,  
executors and administrators, jointly and severally,  
by these presents.

Sealed with our seals and dated this 2d day of  
February in the year of our Lord one thousand nine  
hundred and twenty-one.

WHEREAS, lately at a District Court of the  
United States for the Northern Division of the North-

ern District of California in a suit depending in said Court, between the United States of America, as plaintiff and Joseph Rosenthal as defendant, a judgment was rendered against the said Joseph Rosenthal and the said Joseph Rosenthal having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California in said Circuit.

Now, the condition of the above obligation is such, that if the said Joseph Rosenthal shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH ROSENTHAL.

MAURICE ROSENTHAL.

MOSES HARTMAN. [21]

State of California,

City and County of San Francisco,—ss.

Maurice Rosenthal and Moses Hartman, the persons whose names are subscribed as sureties to the above bond, being severally sworn, each for himself, says:

That he is one of the sureties named in the above bond; that he is a resident and householder within the city and county of San Francisco, and that he is worth the amount specified in said bond as the penalty thereof over and above all his just debts and

liabilities exclusive of property exempt from execution.

MAURICE ROSENTHAL.  
MOSES HARTMAN.

Subscribed and sworn to before me this 2d day of February, 1921.

[Seal] LOUISE BEARDEN,  
Notary Public in and for the City and County of San Francisco, State of California.

Bond approved—Feby. 3, 1921.

WM. H. HUNT,  
C. J.

[Endorsed]: Filed Feb. 4, 1921. Walter B. Mal-  
ing, Clerk. By Thomas J. Franklin, Deputy Clerk.  
[22]

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In the District Court of the United States, in and for  
the Northern District of California, Northern  
District.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

**Stipulation as to Settlement, Allowance and Signing  
of Bill of Exceptions.**

It is hereby stipulated between the parties of the  
above-entitled action, as follows:

1. That the defendant's bill of exceptions was

presented to the United States Attorney for objections and amendments thereto on January 27th, 1921, within the time allowed by law as extended by orders thereafter duly made by Judge of the United States Court duly qualified.

2. That the same has been carefully examined and considered and that the United States Attorney has no objections to the settlement, allowance and signing of the same, and has no amendments to offer thereto, but is of the opinion that the same is a true, full and correct bill of exceptions in said case in behalf of the defendant. It is hereby this day returned to defendant's attorney for delivery to the clerk to be sent by him to the Judge trying said action for settlement.

3. That the clerk of this court is hereby directed to immediately forward the same together with this stipulation to Honorable Edward E. Cushman, United States District Judge, who tried said action, who is hereby requested to settle, allow and sign the same as defendant's true and correct bill of exceptions herein and return the same to the clerk of said court. The fixing of a date for the settlement of the same is hereby expressly waived.

Dated this 1st day of March, 1921.

FRANK M. SILVA,

U. S. Attorney.

JOS. E. BIEN and

JNO. B. CLAYBERG,

Attorneys for Defendant.

(Attached to engrossed bill of exceptions and filed therewith.) [23]

In the District Court of the United States, in and for  
the Northern District of California, Northern  
Division.

No. 586.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

**(Engrossed) Bill of Exceptions.**

BE IT REMEMBERED that the above-entitled cause came on for trial on the 30th day of November, 1920, being one of the days of the November term of said court, before the Honorable Edward E. Cushman, one of the Judges of said court, and a jury duly impanelled, and that said trial continued from day to day until December 2d, 1920.

R. B. McMillan and Wilford H. Tully appeared as counsel for the Government, and E. S. Wachhorst and R. Porter Ashe, appeared as counsel for the defendant.

The Government, to maintain its cause, offered the following evidence, to wit: [24]

**Testimony of W. E. Van Dorn, for the Government.**

W. E. VAN DORN, called and sworn as a witness in behalf of the Government, *and* testified in substance as follows:

That he was the manager of the Shipping Department of the John Bollman Company during Novem-



(Testimony of W. E. Van Dorn.)

ber, 1919, and prepared for shipment cigarettes from that firm; that he prepared 42 cases of cigarettes from that firm to a number of consignees in the state of Oregon; that the records of such consignees show that they were P. W. Jenkins, Hart Cigar Company, United States Cigar Company and Lang & Company, all of Portland, Oregon; that said cigarettes were shipped on November 7, 1919, over the Southern Pacific Railway Company; that the John Bollman Company was and is a manufacturer of the brands of cigarettes which were shipped in the above shipment and the shipments were made to jobbers, not retailers; that at the time of the shipment the Chesterfields were of the value of \$7.80 per M, the Fatimas were \$9.80 per M, and the Piedmonts were \$7.50 per M; that the cigarettes were packed in paper containers and some were in fiber containers; that there were 5 M packages of said cigarettes in the small container. They were sent out for the Christmas trade and were wrapped in paper with Christmas designs on them. The date of the revenue stamps thereon was October 19, 1919. After an examination of a certain package witness further testified that these Piedmonts stamps do not show any cancellation; these Fatimas show the date of the cancellation very plainly; when the packages were shipped they were numbered to the firm they were to go to and each shipment shows how many packages there were in the shipment to the various consignees. These numbers were put on the packages by a stencil and have been removed on a good many but there is one carton

(Testimony of W. E. Van Dorn.)

which shows evidence of a number; that he notes an indication of a mark on one of the packages in the character of the stencil with which he put the mark on and it has been scratched out; that the address is usually stamped on the end of each package. "We use a half inch stencil and here is the mark made by that [25] stencil." Witness then identifies the various packages as having been shipped by John Bollman Company; that certain packages contained 5 M others 10 M and a little carton containing 200, and the brands as shipped were Fatima, Chesterfield and Piedmont, all Christmas wrapped; each package was properly stamped and stenciled. "We have never sent any packages outside of San Francisco which were not stamped and stenciled;" that the packages investigated were not in the condition they were when shipped because the are all marred up; stenciling has been scratched up and even the whole top has been torn off over the stamp where the stencil has been put on each of certain boxes; the address has also been torn off.

On cross-examination, witness testified in substance, that he knew the price of cigarettes which prevailed on or about the 1st of November, 1919; that the price of Chesterfields was \$7.80 per M, the Fatimas \$9.80 per M. and the Piedmonts \$7.50 per M; these prices were subject to a discount, how much he could not say. He knows that there was a discount of 10% and 2%, so that the Chesterfields would be sold to the jobbers at \$7.80 less 10 and 2



(Testimony of W. E. Van Dorn.)

On redirect examination, witness testified that the prices quoted are from the manufacturer and given to the jobbers who sell to the retailers; that it is not a retail price.

On recross-examination witness testified in substance, that these prices fluctuated and are now higher than at that time, that the change went into effect October 23d, 1919, but they did not change the price until November 24, 1919.

**Testimony of C. H. Davis, for the Government.**

C. H. DAVIS, a witness called and sworn in behalf of the Government, testified in substance as follows:

That he is a receiving clerk for the Southern Pacific Company at 3d and Townsend Streets, San Francisco, and was such receiving clerk on or about November 1919; that while so employed he received a shipment of 42 cases of cigarettes mentioned by witness Van Dorn; that he took them in and they were placed [26] in C. E. & I. car 35132; that he sent them and turned the bills over to the loading clerk to put in the car on November 7th, 1919; that the same were received by the Southern Pacific Company then under federal administration; that there were four different shipments; they made inquiries at that time whether or not they were received and we checked the numbers of that car. The loading clerk put them into the car and witness presents the records of the four separate shipments and testifies that such records are made out in triplicate, original and a memorandum of another. The memo-

(Testimony of C. H. Davis.)

randum is kept by the shipper. These cigarettes were all checked in by some official and the initials of the checker is afterwards placed thereon. Whereupon the Government introduced in evidence, Plaintiffs' Exhibit 1 for identification.

**Testimony of Harry G. Lawrence, for the Government.**

HARRY G. LAWRENCE, a witness called and sworn in behalf of the Government, testified in substance as follows:

That on November, 1919, he was carload check clerk, or loading clerk of the Southern Pacific Company, and that he checked into car C. E. I. 35132 the particular shipment identified here from John Bollman Company to Portland, Oregon, in his capacity as loading clerk; that he had present one of the records there, from which he could tell where it was checked in; that there were two lots of 13 and one lot of 12 and one of four, making a total of 42 packages, all consigned to Portland, Oregon. This car was routed over the Southern Pacific and that company is engaged in interstate commerce, or was at that time. It was then under the government administration.

**Testimony of Peter E. Moor, for the Government.**

PETER E. MOOR, a witness called and sworn in behalf of the Government, testified in substance as follows:

That he was gang foreman in November, 1919, for

(Testimony of Peter E. Moor.)

the United States Railroad Administration, stationed at Portland, Oregon, and in that capacity did check out C. E. I. #35132; that [27] he had the records with him and they showed a shortage in the car as follows: the bill for the United States Cigar Company originally called for twelve cartons and they received ten, Lang & Company originally called for thirteen packages and we only received one, the Hart Cigar Company called for thirteen cases and received none at all. T. W. Jenkins called for four packages and received none at all; that out of the 42 packages, 39 packages were short; that he checked the car out on November 13, 1919; that the shipment was from California and that he checked the car out at Portland, Oregon.

At the close of this witness' testimony, counsel for the Government offered "These records at this time the waybill record" to which offer counsel for defendant stated that they had no objection. Whereupon the Court announced: "They may be admitted and numbered Exhibit #2 for the prosecution."

### **Testimony of A. E. Jenkins, for the Government.**

A. E. JENKINS, a witness called and sworn in behalf of the Government, testified in subsequence as follows:

That his firm on or about the month of November, 1919, ordered certain cigarettes from John Bollman Company at San Francisco; that they were invoiced for 5,000 Chesterfields in Christmas packages, 1,500 Fatimas in Christmas packages and that the date of

(Testimony of A. E. Jenkins.)

the order was October 30, 1919, that the goods were shipped on November 7th and that the invoice price on these cigarettes was \$7.80 per M on the Chesterfields and \$9.80 per M on the Fatimas; that the discount was 10% and 2% for cash; that his firm did not receive any of these cigarettes but filed a claim for \$167.40, which was paid on March 20, 1920. He believes it was paid by the United States Railroad Administration.

**Testimony of E. J. Croomsie, for the Government.**

E. J. CROOMSIE, a witness duly called and sworn in behalf of the Government, testified in substance as follows:

That he is Secretary of the Hart Cigar Company, Portland, [28] Oregon; that his firm ordered cigars from John Bollman Company of San Francisco on or about November, 1919 that such order was for 30 M Chesterfields at \$7.80 per M and 30 M Fatimas at \$9.80 per M and 5 M Piedmonts at \$7.50 per M; that all these prices are less 10%, making a total of \$508.95; that the records of the firm do not show the order, but that he had a copy of the original notice from John Bollman Company dated November 7th; that his firm waited until the 6th day of December and then put in their claim for \$508.95 which was paid on May 22d; that he should judge it was paid by the United States Railroad Administration because the claim was paid to it.

On cross-examination witness testified that they took the 10% off these claims but not the 2%; that they were entitled to 2% off for cash.

(Testimony of E. J. Croomsie.)

On redirect examination witness testified in substance that this is the wholesale price from the manufacturers and not the retail price on such cigarettes; that the firm were jobbers.

Whereupon, counsel for the defendants stated: "We have consulted with the District Attorney in regard to stipulating the certain facts that are necessary to place this case before the jury in order to facilitate the trial of this case we have agreed to stipulate to what they indicate at this time in regard to proving the conditions of the freight departments," etc.

COUNSEL FOR THE GOVERNMENT.—"Then it will be stipulated that these particular packages, or these particular 39 packages, were shipped in this car C. E. I. 35132.

COUNSEL FOR THE DEFENDANTS.—"Yes."

COUNSEL FOR THE GOVERNMENT.—"And over the lines of the Southern Pacific Company and in interstate commerce?"

COUNSEL FOR THE DEFENDANTS.—"Yes we will stipulate to that." [29]

COUNSEL FOR THE GOVERNMENT.—"And that the same was stolen, removed from the car?"

COUNSEL FOR DEFENDANTS.—"Yes. If we want the location where they were stolen, will you give the same to me?"

COUNSEL FOR THE GOVERNMENT.—"Yes; they were stolen between Roseville and Gerber."

COUNSEL FOR THE DEFENDANTS.—"Very well we will stipulate to that."



(Testimony of M. H. Young.)

COUNSEL FOR THE GOVERNMENT.—“And that they were stolen on or about November, 1919, or October, 1919,”

COUNSEL FOR THE DEFENDANTS.—“Very well.”

Whereupon the Court announced: “The jury will so understand.”

**Testimony of M. H. Young, for the Government.**

M. H. YOUNG, a witness called and sworn in behalf of the Government, testified in substance as follows:

That during the year 1919 he was yardmaster for the Southern Pacific Railroad Company and had been employed by that company for seven years; that he was stationed as yardmaster at Roseville, California, during the months of September and October, 1919; that he knows the defendants in this case and first met Mr. Fitch around about September 28, or 29th, 1919, at the Pacific Sales Company on the corner of 6th and L Streets, Sacramento, California, at about six o'clock in the evening; that Mr. and Mrs. Fitch were present; that he went into the side door entrance of the Pacific Sales Company, approached Mr. Fitch, and asked him in regard to cigarettes, if he could use some cigarettes which he had. “He asked me about how many I had and I told him I had about 12 cartons, which is 120 M,” and he said, “Will you come in here tomorrow about nine o'clock and I will find out from the San Francisco office”; witness came back the

(Testimony of M. H. Young.)

next morning about nine o'clock and Fitch told him to bring them in and he would take them at \$5.00 per M; witness had on his old clothes that [30] he had been wearing around *the years* and about three or four days' beard on his face. He was in rough dress just as he came in from the railroad where he had been working, and had on ordinary working clothes. "I saw Mr. Fitch next around about October 15th"; that he delivered the cigarettes that morning; that he got through very close to twelve o'clock; they were delivered to them in an automobile, a touring car; that witness was alone when he made the delivery *for* the cigarettes, but when the cigarettes were taken down in the car and put on the sidewalk, Mr. La Veque was with him; who was at that time a switchman working at Roseville; that the only conversation he had with Fitch at that time was that he asked him if he wanted any record in regard to the cigarettes and he said "No." Mr. Fitch paid me in cash; I believe \$597.00. We had no conversation at the time the cash was paid. Witness understood that Fitch was general manager of the Pacific Sales Company, 6th and L Streets, Sacramento; that he saw both Mr. and Mrs. Fitch around about October 15th and thereupon identified Mr. Fitch, who was in the courtroom during the trial. That at that time Mr. La Veque came in, but witness did not hear the conversation. He asked us if we had any more, and Mr. La Veque told him we had 40 more cartons of cigarettes and asked him if he could take them. He said, "Yes," they could,



(Testimony of M. H. Young.)

at a cheaper price. Witness helped take the cigarettes there in the touring car and a little truck. There were no signs on the truck. "We took there 24 cartons at one trip and 16 at another, making a total of 40. We made two deliveries of about 400,000 cigarettes altogether. It took us about three hours to make these deliveries," and witness had no conversation with Fitch except that "he asked us where we lived. We told him at Gerber," which is about 125 miles from Sacramento. Witness thinks that it was on the first trip that they were asked where they lived. It was on the same day that they made the delivery. [31] The second delivery was made within about three hours, maybe two and a half hours from the first delivery. "Mr. La Veque was with me at the time and he was given the name of Mr. F. W. Burke to Mr. Fitch." Witness went by the name of McAllister. "We were dressed about the same on the second as on the first trip. We had on our old clothes and probably were not shaved clean; old clothes as switchmen are ordinarily dressed. We had on our working clothes. The next time I saw any of the defendants was in the store there later, three or four days later, but had no conversation with them"; he was going around and walked in there, that was all. They made the second payment by a check given to Mr. Burke, whose name was on the check. The check was signed by Maurice Rosenthal, was signed on the bottom of the check; "could not say what bank it

(Testimony of M. H. Young.)

was drawn on, but we were instructed to go to the Farmers & Mechanics' Banking Company, Sacramento, to have it cashed. The check was given to Mr. La Veque, or Mr. Burke. It came after the delivery of the cigarettes. We gave Mr. Fitch a bill of sale at one particular time—the only bill of sale that we ever gave. It was requested by Mr. Fitch after the goods were delivered. He came in there and said, 'The check is here, but I will have to have a bill of sale before I can give you a check.' This was about 10:30 in the morning. Mr. La Veque told him in my presence that the bill of sale was at home," which was in Gerber. "We went up the street, made out a bill of sale, and round about forty-five minutes later we came back with the bill of sale and it was accepted. The bill of sale was dated from Roseville"; witness does not recall what the names were signed to it, but believes the name of one was Wilson; could not say whether or not the name La Veque appeared on that bill, but didn't think it did. As witness remembers, on the face of the bill it was W. McAllister and F. W. Burke to so and so.

"In the course of a week, I should think, I next saw the defendants at 6th and L Streets, at the Pacific Sales Company; [32] saw Mr. Fitch and Mr. Joseph Rosenthal. Was informed by Mr. Fitch that Mr. Rosenthal was coming up to see about the cigarettes and when we saw Mr. Rosenthal he informed us that he wanted to draw up a contract with us." Whereupon witness identified

(Testimony of M. H. Young.)

Joseph Rosenthal, defendant, as being present in court. That he had no conversation with him at all. La Veque had a conversation in witness' presence, but witness heard very few words, as he stepped over to one side of the store and paid no attention to what was going on; did not participate in the conversation at all; that the only time he saw the contract was when he was showing it to Mr. Burke, or Mr. La Veque, in his presence; that witness did not have to sign it; that neither Fitch nor Rosenthal requested him to sign it; that it was not signed in his presence, Mr. Fitch told witness that Rosenthal wanted to see him; that witness saw defendants the next time at various times within two or three days after the contract had been drawn up, which was October 30th or 31st, up until the 10th day of November; that witness means by "seeing them," Mr. and Mrs. Fitch, but not Mr. Joseph Rosenthal; that after the time he saw Mr. Rosenthal with Mr. Fitch they made their deliveries to that place; that witness could not give the dates, "but between November 1st and 10th we delivered to them 124½ packages which would be 1,245,000 cigarettes—124 large cartons of cigarettes and one small one"; had no conversation with Mr. Fitch on these occasions. Delivered Chesterfields, Lucky Strikes, Camels, Piedmonts, a few Omars and Fatimas and a little tobacco at various times; that the Omars, Farimas and Piedmonts were delivered on the morning of November 10th, 11:30 A. M. Mr. Fitch received these cigarettes on that

(Testimony of M. H. Young.)

occasion. There were 30 cartons of cigarettes and \$17.00 worth of tobacco which was of different kinds; "there were some Peerless, some Pieperheidsick and I don't just recall just what other kinds there were. They paid us for these cigarettes, \$4.50 per M and \$17.28 for the tobacco." Witness believes the check was for \$467.28. "For the Fattimas they paid us \$5.00 per M and for [33] those they bought under the contract \$4.50 per M; that witness could not say about the condition of those 39 packages delivered on November 10th, 1919, but the most of them were Christmas cigarettes; there were markings there indicating the consignee, but they were not on there at the time they were delivered. "We took the names and pulled them off, but there were markings there showing the paper was scratched up." Witness identified the cartons of cigarettes and testified that they were in the boxes which they delivered to them and identified the same by the place they had taken the names off of the boxes where they were consigned to; that they were in that condition when they were delivered to Mr. Fitch. With reference to the other packages, "they had the name on right here and this is the way it was delivered." Witness could not say whether this box was torn open like this or not, but this is where the name was torn off when the boxes were delivered to the Pacific Sales Company. Indicating another box, witness testified that it was one of the boxes where the name was torn off, stating "around here was this Christ-

(Testimony of M. H. Young.)

mas holly paper and we also tore that off the outside. Here is another one that the name is torn off of. Here is another of them. This is another one, and this is one here." Witness stated that all these were in the condition they were delivered with the names pulled off. Witness continued, stating that they cut off the markings on these packages at Lincoln, Placer County, California, and that at the time they cut off the names and addresses the packages were addressed and consigned to people in Oregon, but witness did not know whereabouts in the State of Oregon, or the names of the people, but remembered that they were going to Oregon. We were paid \$4.50 for the Chesterfields. We were paid \$5.00 per M for the Fatimas on the first time we came there; \$4.50 for the Lucky Strikes. The first lot we took there was Lucky Strikes, and if witness is not mistaken they were paid \$5.00 per M for them and on subsequent sale they were paid \$4.50 per M. Was paid *wither* \$4.50 or \$5.00 for Omars; was paid no sum in excess [34] of \$5.00." Witness further testified that they got these Omars from the Southern Pacific Company out of box-cars at Wheatland; that they did not belong to witness and nobody authorized him to take them out of the car; that they removed them from the side door of the car without permission from anyone to do so. "We got these 39 cases above referred to at Wheatland when we started to leave Wheatland, pulling out of the sidetrack. We got them out of the car then; rolled



(Testimony of M. H. Young.)

them out of the side door. Mr. Burke, or La Veque, was with me. We got these cigarettes on the evening of November 8th, which was Saturday evening, and delivered them on the morning of November 10th, after the execution of the contract above referred to. After they were removed from the car we picked them up and took them up and put them into a touring car and took them to Lincoln, where we waited until morning and took off the names; stayed at Lincoln all night and left there about 9:30 or 10:00 o'clock in the morning. Delivered to the Pacific Sales Company altogether in the neighborhood of 2,500,000 cigarettes between the dates of September 28th and November 10th and were paid close to—pretty close to \$5,500; were not paid for all the cigarettes we delivered; that at the price they offered us there were about \$5,600 yet due.

When we talked to Mr. Fitch he never asked us where we got the cigarettes, nor what our business was, nor did we ever give him any bill of sale except the one above mentioned. We never gave or showed any references and were never asked for them by either Mr. Fitch or Mr. Rosenthal. Never put up a bond of indemnity to guarantee the delivery under the contract, nor was any requested of us. They did not request any banking references or ask us where we banked." Witness believed there were three or four checks given them, all signed by Mr. Maurice Rosenthal. The first payment was given to us in cash; and all the cigarettes



(Testimony of M. H. Young.)

that were delivered were stolen by Mr. La Veque and myself from the Southern Pacific Company..  
[35]

On cross-examination witness testified in substance as follows: That his proper name is M. H. Young; that he sometimes went under the name of McAllister. Had never gone under the name of McAllister prior to this time; that he pleaded guilty of the charge against him but had not been sentenced; had never been convicted of a felony previous to this time; that he had been in the employ of the Pacific Railroad Company for seven years at the time he stole the cigarettes, with the occupation of yardmaster; that a portion of the time he was employed by the Southern Pacific Company as clerk, baggageman and warehouseman, but was always in a trusted position; that between the 27th day of September and 10th day of October he had a confidential, trusted position with the railroad company.

That he entered the Pacific Sales Company on or about the 27th day of September about six o'clock in the evening, and first saw Mr. Fitch; he made inquiry when he first went in for the manager; had not known Mr. Fitch prior to this time; had never seen him before; saw Mrs. Fitch there at the time; believed she was present at the conversation witness had with Mr. Fitch. Witness was alone in the store; Mr. Burke or La Veque was outside of the store somewhere. Witness was dressed in his old clothes; that a man around the railroad yards generally

(Testimony of M. H. Young.)

wears his oldest clothes around greasy box-cars; that witness would not be wearing the best he had; he was yardmaster at that time; that in his work he always was out among the men, helping them; he considered that he was worse in appearance at that time than at the present; believed he had on an old blue serge suit, no overalls; believes he had on a cap, but could not say. His name was not asked him, but he made no attempt to conceal his identity; did not disguise himself or do anything to change his appearance; never had in any way disguised himself when he went in there; that his idea of going in there was, "we went to another place in Sacramento about a quarter of 6 and asked them if they could use some cigarettes and they told us 'No.' We went to the Pacific Sales Company. [36] and he said he would take what we had. I made no attempt to conceal my identity at the place we first entered"; that at the time they were directed to the Pacific Sales Company it was very dark and they did not make known to witness that they were under suspicion at all. "We went into the Pacific Sales Company and I said, 'Where is the manager?' but I don't believe he said he was the manager; that in the conversation I think something was said as to whether we were jobbers or manufacturers, and I did not give him a clear understanding. This other man did not give me any reason why he thought the Pacific Sales Company would buy the cigarettes. Could not say why Mr. La Veque did not go inside with me at the time.

(Testimony of M. H. Young.)

We did not select this place as one of any number of places, and there was no concealment. My conversation with Mr. Fitch was in the presence of Mrs. Fitch. My business was mostly done with Mrs. Fitch. I had only one conversation with Mr. Fitch. Mr. Burke completed the transaction and Mr. Fitch directed us to return the next day. We were there between nine and ten in the morning, in the busy part of the morning. There wasn't so very much doing around there. Mr. La Veque did not accompany me at that time. I had a conversation with both Mr. and Mrs. Fitch. Don't recall the amount of cigarettes that I said I had at that time there for sale. Witness was shown a memorandum and stated that he recalled it, but that he don't think it is dated, but don't know; that the word "Sacramento" is in my handwriting and the word "McAllister" looks like my handwriting. I would not deny that it was, but it is not the way I write. I wrote backhand. Have never used the name McAllister before.

Whereupon memorandum referred to was offered and received in evidence marked Defendants' Exhibit "A."

Witness appeared next morning about 9:30 with the cigarettes for delivery; they were outside of Sacramento and were ready to deliver them when the transaction was complete. Mr. and Mrs. Fitch said they would call up the San Francisco [37] office and let us know. There was nothing said to me at that time by either Mr. or Mrs. Fitch about

(Testimony of M. H. Young.)

the title to the goods to my memory. Witness would not say there was not nor would he say there was. If they had said that they did not want to handle those cigarettes if we had no clear title we would have had a bill of sale to show that we had, because I had that made out for them. We were prepared for them. To witness' knowledge there was nothing mentioned in regard to a clear title to the cigarettes. If they had asked for a clear title I would have given it. This is why I am positive they did not ask where I got them, nor where I was from. When delivering these cigarettes the next morning, or after we had delivered them, Fitch stated, "Your check is here, but I will have to have a bill of sale," and he asked us where the bill of sale was. It was in witness' presence and also Mr. La Veque's and we told him Gerber, or at home. Gerber was the name of the place where we were from previous to that time. We went out and came back with a bill of sale drawn up dated at Marysville. We did not state that we had gone to Marysville for it. We gave him that document and that is all that was said. This bill of sale must be in the possession of the Pacific Sales Company. It was presented by witness. About 9:30 o'clock the transaction was completed and the delivery was made after that. Very close to noon; it took us two hours to deliver them. There was no conversation between witness or Mr. and Mrs. Fitch in regard to the whereabouts of these cigarettes. I delivered them in an automobile, my-

(Testimony of M. H. Young.)

self and Mr. La Veque. We drove up to the sidewalk on 6th Street and the delivery entrance of the Pacific Sales Company openly and in the daytime and made no attempt to conceal anything. People were passing back and forth and when the goods were on the sidewalk Mr. Fitch and another man trucked them into the store within the space of five or ten minutes. They were there ready to get them as soon as we took them out of the automobile and they had them in the store in five minutes. Whereupon the following question was asked: "Nobody seemed [38] to be in a hurry, though," to which witness answered, "I know I was not in a hurry."

Q. Either in delivering the goods or in receiving your money?

A. Yes; I was in a hurry to receive the money. Whereupon witness further testifies that he did not make that known to Mr. Fitch; asked him how soon they could have the money and he gave us cash; I believe it was \$597.00; it was in the morning, but not on the same day that the cigarettes were delivered. The transaction was completed by the delivery before the noon hour and I could not say, whether it was the next day or that afternoon that the money was paid us. Fitch had to find out from the San Francisco office. I did not make any demand for my payment; asked him when we could have the money. There was no intimation on our part that we would return for another transaction. Did not intimate to Mr. or Mrs. Fitch that we had



(Testimony of M. H. Young.)

any more cigarettes or would come back. All the people we dealt with at that time were Mr. and Mrs. Fitch. There was no concealment. Everything was done in the open. The first time the price was fixed at \$5.00 between Fitch and ourselves. Would not say whether he made the offer or whether I said we would take \$5.00. I knew the wholesale price of cigarettes at that time; was not familiar with it; did not talk freely or show considerable knowledge of cigarettes and tobaccos at that time; we discussed the values, quantities and prices on that day. I did have considerable knowledge of cigarettes for the reason that my folks are in the tobacco business. I did not hold any lengthy conversation with Mr. Fitch whatsoever. Said nothing about my experience in the tobacco business. I believe I asked Mr. Fitch \$6.00 for the cigarettes and he told me he could not use them at that price, but I could not say whether he did or not. I could not say that he offered me \$4.50; could not say how the price was arrived at, what the cigarettes should be sold for; there was no long drawn out conversation about this price proposition. I could not say whether Mr. Fitch [39] offered me \$5.00 or whether he would split the difference, or whether I said I would bring them in at \$5.00 or not. I knew what they were sold for on account of having them in our store. My people were in the candy business and I knew what they paid for cigarettes at that time. The next transaction was round the middle of October, say between the 1st and the 15th.



(Testimony of M. H. Young.)

The first lot was taken from the car at Roseville. Some of these goods were taken at various places along the route of the Southern Pacific. There was no understanding between us and anybody connected with the Pacific Sales Company that we were to return with more goods. The second transaction was made by Mr. La Veque. I was not in the store when he went in to make the transaction. We walked down; I believe we drove here in the automobile and parked the same at the sidewalk near or right across from the Pacific Sales Company. Mr. La Veque went down there by himself and I sat out there not over a block away; could not explain why I did not go with La Veque; did not think I ought to go back and try the same thing over again. La Veque was roughly dressed at that time in his working clothes. I could not say exactly how he was dressed, but know he did not have on his Sunday suit. Wore overalls on several occasions. Could not say whether he did at this time or not. I was not in store at the time; the only part I took was that I helped to deliver the cigarettes. Don't know the conversation between La Veque or anybody in there, nor who he talked with. We delivered about 40 packages. Mr. Burke, or La Veque, received the money. I was not present when it was delivered. But the proceeds of the first transaction was paid in cash, and the second transaction was by check, I believe, for \$1,080.00.

Whereupon the following question was propounded to the witness: "At that time was there

(Testimony of M. H. Young.)

anything done at all to inform the Pacific Sales Company that you were interested in that—was anything done by any person to show that you were interested in the same?

A. I know I was interested; I was getting the money. [40]

Q. “Was there any conversation, or did you speak about it?     A. We never.”

Q. “Did you talk with anybody so that they knew you were interested in that conversation?”

A. “Well, I talked with Mr. Fitch in regard to where we had lived, etc.”

Q. “At this time?”

A. “Yes, sir, on the delivery, not on the—don’t misunderstand me that I was in there making arrangements for the sale, but on the delivery of the cigarettes.”

WITNESS—(Continued.) Mr. Fitch recognized me at that time; spoke to me; could not say whether he called my name or not. He had it down McAlister. Mr. Burke received the check, cashed it and the money was divided between us. To my best recollection on the corner of 6th & K or 6th and J streets. We got paid for I think 24 cartons and just a few days later there were 16 more. I took no part in any transaction between Burke and the Pacific Sales company at that time. The next transaction was a check calling for the amount of \$2,565, I believe, and I could not say as to the exact date; I believe there were 57 cartons in all.

Whereupon counsel for the defendant offered the

(Testimony of M. H. Young.)

check for \$2,565 in evidence. The same was admitted without objection and marked Defendants' Exhibit "D."

The next transaction was where we received a check for \$2,565.00. Witness was shown the check for \$922.50 and testified that he believed that was not for 16 or 18 cartons, which, "I know were delivered very close together. It seems to me that the other check called for cash, something like \$720, but these two checks came in together, are very close. I don't know whether there was a difference between the amount claimed and the amount of the check, but we were paid something like \$100, because Mr. La Veque handled them. He showed me all the checks. In the next [41] transaction I believe the check amounted to something like \$2,505. It was received by Mr. La Veque and he exhibited it to me. Witness here identifies the check. The next transaction I think was November 10th for \$467.20. Witness identifies check which was admitted in evidence. The third transaction was made entirely by Mr. La Veque and outside of my presence. I do not know what the arrangements were or what the transactions were; no questions were asked me. The only person I recall having asked for on the first transaction was Mr. Fitch or Mr. Jos Rosenthal. I had seen Mr. Joe Rosenthal in the morning at the hour of 8:30 or maybe 9 o'clock and he informed me that Mr. LaVeque wanted to draw up a contract. I was not present at the conversation between Rosenthal and Burke. After Mr. La Veque,

(Testimony of M. H. Young.)

*alias* Mr. Burke, made his arrangements, or completed his transaction with the Pacific Sales people, I was not present at all but was present when the contract was read over. We were standing by a pile of cloaks when it was read over. When it came to signing I walked out. I don't know whether I had been introduced to Mr. Joe Rosenthal or not; I had no conversation with him whatever. He did not refer to me in any way, nor ask any questions. Don't know whether he knew that I was interested but I suppose that Mr. Fitch had told him I was the man that brought them in there the first time. Could not say how the contract was prepared; simply heard them read the contract over. Whereupon the following questions were propounded to witness:

Q. "In all the conversations that you know of between yourself and Mr. Burke, *alias* La Veque and the Pacific Sales Company, was there any attempt on the part of any person to conceal anything?"

A. "Well there was an attempt on our part to get in early in the morning; we would drive up about 7:30 and wait until the opening time of the store."  
[42]

WITNESS.—(Continued.) We brought up to the side door on 6th street; we would get in at 7:15 in the morning and then wait until the store opened up, about eight o'clock. We would go up to town in the meantime.

Witness was asked the following questions:

(Testimony of M. H. Young.)

Q. "There was no attempt on your part to conceal anything when you got into the store?

A. Everything was covered up by blankets so that there would be no detection whatever.

Q. What I want to get at is this. Did you make any attempt to make any concealment or convey openness when you got into the Pacific Sales Company store.

A. As much as we could.

Q. In what manner? Did you drive in in broad daylight and park on L Street or on 6th Street?

A. Yes, at the side door."

WITNESS.—(Continued.) One or two precious deliveries had been made at these doors. Mr. Fitch told us once, "You can go to the back hall and make the deliveries there." Do not know who trucked it in. Could not say that was the only reason why we drove to the back door. We did not try to make everything known; we tried to keep things concealed as far as we could. Whereupon the following questions were asked:

"Q. As far as you know, everything was done in the open and in the presence of the people in the store and people passing back and forth on the outside. A. Yes, sir.

Q. You did not at any time tell Mr. Fitch or Mrs. Fitch or any other person connected with the Pacific Sales Company that you were in a hurry to receive your money or that you wanted it right away? A. No, sir."

WITNESS.—(Continued.) I could not say whether



(Testimony of M. H. Young.)

I became acquainted with Mr. Joseph Rosenthal or not. It was on this one [43] day that I saw him on two or three different occasions on that day. I had no conversation with him. Whereupon witness identified the contract and further identified that it had been drawn up in three copies, one to Mr. Fitch, one forwarded to San Francisco and one given to Mr. Burke. He subsequently lost his copy. Whereupon the contract was offered and received in evidence and marked Defendants' Exhibit "F." I did not know Mr. Maurice Rosenthal until this morning, when he came into court. I had never seen him before and never had any business transactions with him. As to the condition the cases of merchandise delivered were in, would say the boxes were broken, some of them, and we had some worse than those I see here, where the packages inside had been disturbed and from what I know, some of them were torn. Could not say whether credit was allowed for that condition. One amount that we suppose amounted to twelve cartons, they would come to \$600, we were paid \$597.00, a discount of \$3.00, and I believe there were two or three little cartons. All of these were there. Numerous packages were badly damaged where they were rolled out of the car and hit the gravel.

On re-examination witness testified as follows: I happened to be in the office of the Pacific Sales Company the day upon which Jos. Rosenthal was in Sacramento; I came there in the presence of Mr. La Veque; I was interested in it the same as



(Testimony of M. H. Young.)

he was. I believe that the only conversation I had on that day with Mr. Fitch was that the son was in to see about how many cigarettes we had and had no prior conversation with Fitch about being there on that day to my knowledge. He told me the day before when Joe Rosenthal would be there. I don't remember whether he told me, or Mr. La Veque, but I know he said to come right there in the morning and he would be there about 8:00 or 8:30. [44]

**Testimony of F. W. La Veque, for the Government.**

F. W. LA VEQUE, a witness, was called and sworn in behalf of the Government and testified in substance as follows:

That his occupation in November, 1919, or during the year 1919, was a switchman at Roseville, Montana; that he worked with the witness who was just called to the stand, M. H. Young; that he first met any of the defendants the latter part of September; that he first met Mr. Fitch at 6th and L Streets; that he went in there to see if he would buy some cigarettes. I had a conversation with him. He told me he could, if the price was right, and asked me what I expected for them. I told him I believed about \$6.00 I thought was right. Anyway, he talked me down to \$4.50 per M, and I consented and let him have them for that. He asked me what kinds of cigarettes they were and I told him I had Lucky Strikes, some Camels and Chesterfields. He asked me when we could deliver them and I told

(Testimony of F. W. La Veque.)

him the next day or right in the near future, and he said all right, if we would bring them down he would receive them. He had to communicate with San Francisco, I believe Mr. Rosenthal, in regard to the payments of them. That took perhaps two or three days before we got our money. I was alone in there when I had the first conversation with him relative to the sale of the cigarettes. At the time of their delivery Mr. Young was present. He did not talk to Mr. Young more than when we were handling the cigarettes he spoke to him. As a rule I wore a pair of gray corduroy pants, sometimes a blue coat, soft shirt and collar, sometimes had a hat and sometimes I had a cap, sometimes I had on overalls over my corduroy pants. In my duties as a switchman I had to handle the freight-cars that came into the yard; at Roseville we make them up into trains going in three or four different directions and we place them on the proper tracks. I had on my usual working clothes. It was between 3, 4 or 5 o'clock when I first went into the store of the Pacific Sales Company. We delivered the cigarettes in a day or so from that time and of course I saw Mr. Fitch and a few days after that I saw Mr. Joseph Rosenthal. [45] I took the check to the Farmers & Mechanics' Bank and had it cashed. The bank did not cash it without identification. I took it to the Pacific Sales Company and Mr. Fitch O.K.'d the check and then I went back and cashed it. They did not know me at the bank and Mr. Fitch did not ask who I was. He asked me where

(Testimony of F. W. La Veque.)

I lived and I told him Gerber. He asked me if I was in business and I told him "No." I believe it was on that occasion that we gave him the bill of sale, but this bill was demanded after the check had come from San Francisco and we went in for the check. He says, "Your check is here, but we will have to have a bill of sale," and he says, "Have you got it here?" and I says, "I have got it at home. I left it in my other coat." I had told him that I lived at Gerber at that time. We went out and returned in about thirty or forty minutes with the bill of sale and we gave it to them. The amount covered more than the amount we had and I presented it to Fitch and he gave me the check. The bill of sale was made out on a piece of plain paper with pen and ink. Mr. Young, the witness who just testified here, wrote it. I don't know the exact time I saw any of the defendants next, but right around there very closely I saw Mr. Fitch. On one of the occasions he told me that Mr. Joseph Rosenthal was coming up from San Francisco and he wanted to see me in regard to these cigarettes, about how many we had. Whereupon witness identified Mr. Joseph Rosenthal as being present in court, as well as Mr. Fitch.

WITNESS.—(Continued.) Maurice Rosenthal's name was signed to the check. I saw Joseph Rosenthal that evening. Fitch introduced him to me and he asked me how many cigarettes I had and we told him between two and three millions. This was in the morning that I was there, between 8

(Testimony of F. W. La Veque.)

and 8:30 and he was not there then. I came back a little later, I should judge between 8 and 10 o'clock, and he was there. I believe Mr. Young was with him. Rosenthal asked me how many I had and I told him between two and three millions. He then said he was going to draw up a contract to that effect and that night I received the same and signed it. [46] I did not dictate any of the terms of that contract. It was drawn up when I first saw it. It was not drawn in my presence and he did not ask me whether I had any more then; Mr. Fitch and Mrs. Fitch and myself signed the contract and I believe Mr. Joe Rosenthal did also. Whereupon witness identified the contract as the one furnished by Mr. Joe Rosenthal, which is in the words and figures following:

“Sacramento, California, October 31st, 1919.

I, F. W. Burke, residing at Gerber, California, citizen of California, United States of America, agree to sell to the Pacific Sales Co., located at 6th & L Streets, Sacramento, Calif. Two and one half million (2,500,000) or over cigarettes, composed of the following brands: Camels, Lucky Strikes or Chesterfields. The price of the same to be Four fifty (\$4.50) per thousand. Delivery on same to be one-third on November 1st, 1919, and the balance within fifteen (15) days. Terms and payment on same to be as follows: One third payable December the 1st, 1919, one third payable December 15th, 1919, one third payable January 1, 1920.

The seller, F. W. Burke, guarantees the cigarettes

(Testimony of F. W. La Veque.)

to be in first class salable condition. He also guarantees that these cigarettes were not obtained in any illegal manner, or in violation of any Federal, State or local law or statutes, and gives to the Pacific Sales Company, a clear bill of sale to same, with each delivery. In the event F. W. Burke having a larger quantity of cigarettes than stated above of the above brands, he agrees to deliver and the Pacific Sales Co. to accept the same on the same basis of Four Fifty (\$4.50) per thousand.

F. W. Burke further agrees to deliver these cigarettes F.O.B. to the Pacific Sales Co. 6th and L St., Sacramento.

(Signed) F. W. BURKE.

I accept the above for the Pacific Sales Co.

(Signed) JOSEPH ROSENTHAL.

Witnesses:

ARTHUR F. FITCH.

ROSE FITCH." [47]

WITNESS.—(Continued.) "This is the contract which I signed and is one of the triplicate copies. The contract heretofore read in evidence was thereupon admitted and marked Plaintiff's Exhibit 3. Joe Rosenthal said he would write up a contract; did not tell him to put in any of the terms. The only terms we had agreed upon, was the price. The contract is signed F. W. Burke, which is the name I was known by and signed to this contract. We did not sell any cigarettes under this contract that we got paid for. We delivered cigarettes under this contract; the first delivery was about 125,000,



(Testimony of F. W. La Veque.)

shortly after it was made and in a very few days. This delivery was made in November. I believe we delivered 127,000, some odd, cigarettes applying on the contract, Camels, Lucky Strikes and Chesterfields, I should judge; they were mixed up, but Camels, Lucky Strikes and perhaps a few Chesterfields. We afterwards delivered some Fatimas, Chesterfields and Piedmonts, and some chewing and smoking tobacco. Our contract did not cover Piedmonts or Omars. We delivered these around the 10th of the month; I believe it was 39,000 packages and some chewing and smoking tobacco. It was not covered by our contract. We went into the store with this particular bunch of cigarettes, these 39,000 packages, and this chewing and smoking tobacco and asked Mr. Fitch if he could get the money for them and he said we could, but he had to write to San Francisco and in a very few days we got the check covering them, I believe \$467 and some odd cents. This check was signed by Maurice Rosenthal. I gave no bill of sale under this contract, but we got one check after we made it out, applying to the cigarettes on the contract. They did not request of me any indemnity bond or guarantee, nor was anybody else signed on our guarantee under the contract. They asked for no references. They did not ask where we banked. He asked me if I was in business at one time, as I told you before. Fitch asked me that and I told him "No." Mr. Joe Rosenthal told me he would take all I had and all I could [48] get at \$4.50



(Testimony of F. W. La Veque.)

per M. He did not ask me if they were stolen. Mr. Rosenthal one day in the store was looking at them and he saw one of these packages, and he said that the name of some steamship company was on it, and he said, "Where did you get them? Were they assigned to a steamship company in Seattle?" as he figured they were perhaps Government cigars. I consider that he did not ask me where I got the cigarettes, because he did not give me a chance to answer and I did not volunteer. He just happened to see something about the steamship company and Seattle and he said he figured they were Government cigarettes. I did not request that the clause, that should I have a larger number of cigarettes I agreed to deliver the same to the Pacific Sales Company at \$4.50 per M. I told him the cigarettes were in Gerber, California and he never asked me how I got them. We delivered over two million cigarettes and have been paid between \$5,000 and \$6,000. To complete the contract they owed us for about 125,000, which would be between \$5,000 and \$6,000. I got these cigarettes that I delivered out of box-cars on the Southern Pacific Railroad. Was not authorized by anyone to take them out of the cars. They were never given to me by anyone and no one sold them to me. The car that was operating at the time I took them was on the Southern Pacific line between Roseville and Gerber and I stole all the cigarettes that I delivered to the Pacific Sales Company. Whereupon witness identified certain packages and further identified that

(Testimony of F. W. La Veque.)

such packages were in substantially the same condition then as when they were delivered. Some of them I think were worse damaged than these are. Some of them were tied together to keep them from falling out; the ends were broken out of them and several of them had been dropped from the automobile. All the consignees' names were cut off the packages. They were all the same class as you see there. Some of them were the large ones and some the small ones. We tore all the marks off; when we brought them to that place the marks were all scratched off. [49] There were several marked Christmas packages.

On cross-examination witness testified in substance as follows:

I was there under the name of La Veque, but was known to the Pacific Sales Company as F. W. Burke. I had never gone to that name previous to these transactions. I came to adopt the name because it was about the first name I could think of, I was not present at the first transaction between Young and the Pacific Sales Company. I was outside the store. A few days later I went into the Pacific Sales Company store myself. Don't remember how many days after that it was. Mr. Young did not tell me at that time of any arrangements he had made with the people in the Pacific Sales Company any more than that I was to proceed with the delivery of the first transaction. There was no concealment tried there at all that I could see. Everything was done in the open and we made no

(Testimony of F. W. La Veque.)

attempt to deceive Mr. Fitch. We drove up to the sidewalk and unloaded the cigarettes right in the open, and people were passing back and forth and we were in plain view of people in the store. Were absolutely in the clear view; I went in the second time. Young told me what name he had used in the first transaction. It was understood between us and also understood what name I should use. There was no attempt to hurry the transaction along in any manner. The second transaction was the one where we took in 400,000 cigarettes of the various brands, some Lucky Strikes, Camels and Chesterfields and they agreed to pay us \$4.50 per M. I had the first transaction with Mr. Fitch. Mrs. Fitch spoke some, but most of the business was done with Mr. Fitch. I signed receipts at the request of Mr. and Mrs. Fitch. The first receipt was handed me, I am pretty sure, by Mr. Fitch. Whereupon witness identified receipt and testified that he signed it, but that he did not know it was written by Mrs. Fitch. Mr. Fitch would talk with Mrs. Fitch about it, but not with me. I remember [50] Mrs. Fitch handing me a letter from Maurice Rosenthal to read and I wrote on the bottom of the letter; I am not sure whether Mr. or Mrs. Fitch requested that. Whereupon the letter was offered in evidence and is as follows:

(Testimony of F. W. La Veque.)

“San Francisco, California, October 1st, 1919.

Mrs. Fitch,

Pacific Sales Co.,

Sacramento, Calif.

Dear Madam:

I am in receipt of yours of September 30th, but before sending you a check for \$1040.00 for those cigarettes which you purchased, we want you to make sure that those cigarettes are not stolen and that the man has a title to those goods, as I do not desire to buy stolen goods, no matter at what profit we can make on same.

If, however, you feel assured that the man has obtained these goods legitimately, telephone us and we will forward check for the money, but if you have any doubt on the subject, let him take his goods back as I do not want to get mixed up with any disreputable proposition.

Yours truly,

MAURICE ROSENTHAL.

P. S.—If the party you purchased these cigarettes from, is willing to sign an affidavit or even this letter that the goods have been purchased by him and that there is nothing owing for the cigarettes, or in other words, if he has a clear title to same, have him sign this letter and return same to us.

I have a clear title to these cigarettes.

(Signed) F. W. BURKE.”

Mr. and Mrs. Fitch asked me for a bill of sale, I think, and I signed that letter that I had a clear title; I did not talk very much at all. All I did was

(Testimony of F. W. La Veque.)

just to sign that letter and that was satisfactory. I indicated to them in no manner that the cigarettes were stolen, nothing that they were stolen. They indicated that they were stolen by the condition [51] of the packages, but I did not tell them they were stolen. We went there openly, but did not talk much. I recall a conversation with either Mr. or Mrs. Fitch in which they said Joe Rosenthal wanted to see me. The conversation I had was with both Mr. and Mrs. Fitch and they told me that Joe Rosenthal was coming up from San Francisco and wanted to see me in regard to these cigarettes. I have a pretty good memory, but do not remember everything. I have forgotten some dates, and perhaps some amounts. What I am telling I am certain of. I always used the name F. W. Burke in signing receipts, or bills of sale, or whatever memorandum was requested of me. I daresay that while I was in the salesroom or office of the Pacific Sales Company I would loiter around considerably or remain in the place for some time, for a half hour or so, and never made any attempt to get in quickly or get out quickly. Went in there many times through the front door and went away through the front door. In response to request of either Mr. or Mrs. Fitch I went back the next day to meet Joe Rosenthal, and I am pretty sure I was told to come back the next day by Mr. Fitch. We had talked with Mrs. Fitch, but not very many times; very little. I talked with Mr. Fitch the most. Everything was put in the terms of the contract now



(Testimony of F. W. La Veque.)

in evidence. All I had to do with it, or did with the contract was to sign it. I never suggested anything in regard to the terms of the contract to Mr. Rosenthal. We went over the terms before the contract was made. Young and I talked that over. Whereupon the following question was asked the witness:

Q. "Did you have a discussion and did not Mr. Young dispute with you in regard to the terms of the contract?"

A. I could not say whether he disputed with me or not.

Q. Do you remember where the contract reads, '30 days or three payments,' didn't Mr. Young insist that you would accept only two payments?

A. I believe there was something about that, that we [52] should make the payments a little bit closer together."

Whereupon witness continued: This was all the discussion between Mr. Young and myself regarding the terms of the contract. I just read the contract and I remember the evidence pretty well. I signed it. Whereupon the following questions were asked:

Q. "Didn't you discuss the contract between you, and you gave in in regard to those terms?"

A. We asked one thing about the terms, those three payments. He wanted them made in two and I said, 'Let it go,' and he said 'All right.'

Q. You stated 'let it go' and Mr. Young agreed to that?      A. Yes, sir."



(Testimony of F. W. La Veque.)

WITNESS.—(Continued.) I took the contract and signed it. Something was said about the business that we were in and one of us got very indignant and said he should not ask such questions from the very fact that we had the goods in such quantities. They never asked us what business we were in. I saw Rosenthal in the morning about 8 o'clock and received the contract about 3 or 4 o'clock in the afternoon, and during that time nothing was said between Young and Rosenthal. Saw the contract first in the afternoon and within a few minutes signed it. Rosenthal just simply made out the contract and I read it over and Young and I discussed the terms that the money was to be paid on and we agreed. In a very few minutes he wanted to know about the delivery of the cigarettes and I think Young went out. Rosenthal suggested the time be given for the delivery of this merchandise or the time of payment. He asked how much time we wanted on that in the morning, then he went out and made the contract. The dates of payment were discussed at the same time when he made out the contract. The first time I ever saw the dates was when he handed me the contract. Whereupon the following questions were asked:

Q. "You were perfectly agreeable to give the Pacific [53] Sales Company all the time they wanted within reason?

A. That was reasonable enough.

Q. Was that for the purpose of misleading them or making them think that you were willing to give

(Testimony of F. W. La Veque.)

them all the time necessary to investigate?

A. No, it was not.

Q. Was it covered by your contract?

A. No, sir.

Q. Why did you give that time?

A. Because they asked for it.

Q. But it was perfectly agreeable to you?

A. It was.

Q. Why didn't you insist upon getting payment immediately?

A. I guess because we did not need the money.

Q. Were you afraid that they might discover these were stolen goods?      A. No, sir.

Whereupon witness continued: In response to a question of the district attorney that myself and Mr. Young stole those goods from a car on the Southern Pacific tracks between Gerber and Roseville; we stole them out of that particular car and delivered them in an automobile and truck. I never told Rosenthal or his associates that we had stolen those goods or intimated or informed them that we had. We took every precaution to remove the identity of those goods so that the purchaser would not know where they came from. We removed all identification marks prior to delivery. Every delivery that was made there was made by us in the open in the morning; there was no concealment. Generally delivered them during business hours as soon as the store was open. He told us the money would be there in a day or two and we would drop in to see whether it was there. Most of the payments were

(Testimony of F. W. La Veque.)

received by check, made out in my name and the checks were [54] received from two to three or four days after the transaction. I took the checks as we received them to Mr. Young. I guess they were all right. If you will show me the checks I will show you my signature thereon. We cashed them at the Farmers & Mechanics' Bank. Had no account there. I was introduced to Mr. Richardson, the president of the bank, but made no arrangements to open an account there. There were no other people implicated in this transaction, this stolen goods proposition, besides myself and Mr. Young. He and I carried on the entire transaction. Young made the first bargain with the Pacific Sales Company and I handled all the transactions afterwards. I was introduced to Mr. Joe Rosenthal, at the time of the contract, by Mr. Fitch. Never met Mr. Maurice Rosenthal. Never saw him until today. Never made any transaction with him. The only transaction I ever had with him was the reading of the letter relative to Mrs. Fitch to be very careful about accepting stolen goods and his signature on those checks. I have been in the employ of the Southern Pacific Company since September, 1917, practically two years at the time these goods were stolen. I consider that I occupied a responsible position during this time. My duties were principally a switchman's duties to make up trains and distribute cars to the different parts of the yards. As a rule, I wore corduroy pants and a pair of overalls when the weather was good when I was at

(Testimony of F. W. La Veque.)

work. When the weather was bad we sometimes put on something heavier than that. When I was not engaged immediately in work I had on a hat and clothes like I have on to-day. When I presented myself to the Pacific Sales Company I was in my working clothes. Don't believe I had overalls on when I went there first. Think I wore a cap on the first day. Whereupon witness recognized Mr. Fitch, testifying that he was the gentleman that he had the conversation with. He also recognized Mrs. Fitch and testified that he could not say for sure [55] that he saw Miss Lewis there. She might have been; that he knew there was a lady with black hair behind the counter but he could not exactly identify this woman because he did not fix her face in his memory. She was in the store at the time of the conversation with Joe Rosenthal. Whereupon witness was asked the following questions:

Q. "Mr. La Veque, Mr. Joseph Rosenthal had had a conversation with you in regard to the identity of the goods; don't you recall that where he stated he thought the goods were Government goods because he saw the words 'Pier' and 'Seattle' on them? A. Yes, sir.

Q. And you mislead him and let him believe it?

A. I did not mislead him.

Q. You did not make any explanation at all.

A. He didn't give me a chance.

Q. What was that?

A. He said he thought they were Government

(Testimony of F. W. La Veque.)

goods but it didn't make any difference at this price.

Q. Do you say that he used just those words or what did he say?

A. He used just about those words.

Q. When he told you they were Government goods you let him believe that.

A. He said he thought they were Government goods.

Q. But you let him believe that.

A. I did not stop him; no.

Q. And for a very good reason?

A. I could not very well unless I would come right out and tell him that I stole the goods.

Q. But you let him believe that they were Government goods, and you made no explanation afterwards, did you?

A. I did not say anything afterwards. I was not allowed to explain. He told me he saw on this one package [56] something about the Steamship Company and he said he thought perhaps they were Government cigarettes, "but that don't make any difference as far as we are concerned at the price I am getting them for." Those were his exact words. He let me believe that at the price he was getting them for that he didn't care.

Q. Did you know, as a matter of fact, that Government goods were selling everywhere in the market?

A. It was not Government goods, those cigarettes I had there.

Q. Didn't you know that Government goods were



(Testimony of F. W. La Veque.)

selling, probably Government cigarettes and tobacco, at a lower market value?

A. I did not know.

Q. Didn't you know it at the time?

A. No, sir.

Q. Did you ever have a conversation with Mr. Young regarding those goods, saying they were Government goods?

A. I never knew that the Government was handling cigarettes, selling them.

Q. Didn't you so understand?

A. I didn't at that time.

Q. But you have since?

A. I have heard quite a lot about it.

Q. Did you know that Government goods were being sold under the market value?     A. Yes, sir.

Q. You gave that intimation to Mr. Rosenthal and he may have been under the impression in the purchase of those cigarettes.

A. Probably so.

Q. You took any kind of means that you could in the sale of these cigarettes.     A. No, sir. [57]

Q. You did try in every manner to keep them from knowing they were stolen.

A. No, he asked me that question. He did not give me time to answer.

Q. You tried in every way in the world to prevent them from knowing they were stolen?

A. I did not, but I naturally didn't want to come right out and tell him they were stolen.

On redirect examination witness testified in sub-



(Testimony of F. W. La Veque.)

stance as follows: Witness was asked the following questions:

Q. "At the foot of this letter, marked P. S., the following language is used, 'If the party you purchased these goods from is willing to sign an affidavit.' Did you offer to sign an affidavit?

A. No, sir.

Q. Did they request you to sign an affidavit?

A. No, sir.

Q. It continues, 'or even this letter that the goods have been purchased by him and there is nothing owing anybody for cigarettes, or in other words, if he has a clear title for the same, have him sign this letter and return to us.' Did you sign this statement? A. Yes, sir.

Q. But they did not request an affidavit?

A. No, sir.

Q. Did they request a statement of you to the effect that there was nothing owing anybody on these cigarettes? A. No, sir; they did not.

Q. Did they ask you to take this letter before a notary public and sign it? A. No, sir.

Q. Did they ask you for any references at that time? A. No, sir; none whatever. [58]

Q. I show you this letter and ask you whether that letter is in the same condition as it was when it was shown to you?

A. I believe it is the very same letter."

Whereupon witness continued, saying that the name Maurice Rosenthal was not written, but was typewritten and not signed; that they didn't show

(Testimony of F. W. La Veque.)

him the envelope, but just the letter. This letter was shown to me before the contract was signed. Mr. Joe Rosenthal, at the time he had that conversation with me about the package having "Pier, Seattle" marked on it, did not ask me at that time whether any of the goods were stolen. He never asked me, but once he told me that it did not seem possible that the goods were stolen, owing to the amount we had. Mr. Fitch never asked me, nor Mrs. Fitch. I believe Mrs. Fitch gave this letter to me the first time. She sent it to San Francisco, or wired, which I do not know, but we got the check in a day or two afterwards. At the time we made these deliveries they did not ask how it happened that those torn places on the side of the packages got there. Never asked us anything about the package, nor called these marks to our attention.

### **Testimony of Bernard McShane, for the Government.**

BERNARD McSHANE, a witness called in behalf of the Government, testified as follows:

That he was, at the time of the trial and had been for about fifteen years, special agent for the Southern Pacific Company; that he was acquainted with the Pacific Sales Company and went to their premises on or about the 14th day of November, 1919, which is located at 6th and L Streets, Sacramento; that he talked to Mr. and Mrs. Fitch subsequent to the arrest of Mr. Young and Mr. La Veque, for the theft of cigarettes from box-cars on the Southern Pacific. At the time of making arrest, the day

(Testimony of Bernard McShane.)

after their arrest which was the 14th, he got a copy of the contract now in evidence here which was found on the [59] streets of Lincoln, in Placer County; saw by the contract that the cigarettes were being delivered to the Pacific Sales Company; that he did not know Mr. La Veque, one of the men who had been arrested, was going by the name of Burke, but he went to the store with Mr. La Veque and in a conversation with Mr. and Mrs. Fitch asked them if they had been purchasing cigarettes from a man by the name of Burke, and they told him they had; that he found some of these cigarettes on the premises, some of these packages here in evidence; found approximately 650,000. I found 29 of the 39 cases involved in this proceeding there on the premises. Goods in the courtroom part of the 29. They are in the same condition as when I found them.

COUNSEL FOR THE GOVERNMENT.—“We offer these in evidence at this time.

COUNSEL FOR THE DEFENDANT.—“No objection.”

The COURT.—Admitted.

WITNESS.—(Continued.) That he told Mr. and Mrs. Fitch that they had been stolen from box-cars and that he would get a truck and haul them away. I did haul them away that day or the next; kept them in the Southern Pacific station. Took photograph or photographs of them, which were accepted in court, whereupon it was stipulated by defendant's attorney that the photographs should be

(Testimony of Bernard McShane.)

admitted. Whereupon the Court said, "They will be admitted."

WITNESS.—(Continued.) That at the time he stated to Mr. and Mrs. Fitch that the cigarettes were stolen they did not demand any proof of that fact nor did they object to the removal of any of them; that witness advised them that the cigarettes had been stolen by these two men who had just testified, Mr. Young and Mr. La Veque, and that we had the men in jail; that he thinks he asked Mr. Fitch to go to the said jail to look at the men, but do not think that [60] he went up there; that he said somebody advised him not to go there, but would not be sure of that, but knows he did not go; that he knows defendant, Maurice Rosenthal; first saw him at his place of business in San Francisco on November 17, 1919. Mr. Maurice Rosenthal, Mr. O'Connell, Chief Special of the Southern Pacific Company, and Mr. Wirtz and myself were present at a conversation held there at the time. Mr. O'Connell and witness went to this place of Mr. Rosenthal's to talk with him about the cigarettes that had been purchased by the Pacific Sales Company here and about the million that had been shipped a few days before to San Francisco from the store here, to find out what became of that million, or pretty near a million. Mr. Rosenthal was not in the office but Mr. Wirtz was and we waited there until Rosenthal came back. Mr. O'Connell asked Mr. Rosenthal what had become of the 50 cases of Lucky Strike cigarettes con-

(Testimony of Bernard McShane.)

taining 10,000 cigarettes which he had received from the store at Sacramento some days previously, and Mr. Rosenthal said he had distributed them among the different stores throughout California and I think instructed the man in the office to call up the different places where the cigarettes were, for we had advised Mr. Rosenthal that we wanted to get them and have them returned to San Francisco. Mr. O'Connell said to Mr. Rosenthal, "Didn't you think there was something wrong with these cigarettes," or some words to that effect, "on account of your getting them at that price," or "Isn't that an unusually cheap price for cigarettes," but Mr. Rosenthal stated that he had thought there was something wrong with the cigarettes and had sent his son Joseph Rosenthal to Sacramento to conduct an investigation for the purpose of determining whether or not the cigarettes were all right. That his son found, or believed, they were all right and had entered into a contract with Mr. F. W. Burke and I believe produced a copy of the contract and showed it to us. Mr. Rosenthal asked me who Burke was and I told him Mr. F. W. La Veque, that Burke was an assumed name. He [61] asked me if he had any property and I told him I thought the other man, Mr. Young, had a house at Roseville.

On cross-examination witness testified in substance as follows:

I asked Mr. Fitch to furnish me a list of the different lots they had purchased from these men.



(Testimony of Bernard McShane.)

I asked first when these lots were purchased.

Whereupon counsel for the defendant asked the following questions:

Q. "Did they do everything in their power to aid you to restore these goods?      A. No, sir.

Q. In what way?

A. Mr. Fitch told me that the first cigarettes he bought was on September 30th. I think he did assist me, but I found on examination of the arrested men that there were cigarettes sold half a month before that time. Mr. Fitch furnished the list in his own handwriting and he is in a position to know everything there. It may be in the writing of Mrs. Fitch but he gave a list of cigarettes purchased to us and they told me that they had purchased 4,143,000.

Q. In what manner, shape or form, Mr. McShane, has any person connected with the Pacific Sales Company deceived you?

A. The letter that was introduced here a while ago shows that. The letter read in evidence.

Q. What did they do to aid and assist you to recover the goods?

A. Nothing, only he didn't tell me about those goods at all." That they did not get back all of the goods from the Pacific Sales Company gotten from the thieves; they had sold some two million cigarettes which we did not get back. They furnished me a list of them, of cigarettes sold from September 30th until the day these men were apprehended. Whereupon the following questions were asked:



(Testimony of Bernard McShane.)

Q. Have they withheld anything from you?

A. I think they have. [62]

Q. Do you know so?      A. I do not."

WITNESS.—(Continued.) That he had no feeling against the Rosenthals or against Mr. and Mrs. Fitch; that he does not recollect that he told Mr. Maurice Rosenthal in San Francisco that he excluded him and his firm from any blame in the matter. I did not think so at the time. I did not ever hold Mr. Rosenthal blameless. I did not tell him that I thought he was not responsible for the transaction. Mr. O'Connell asked Mr. Rosenthal the question as to what became of the cigarettes that he had received on November 4th and 10th; then Mr. Rosenthal said he had shipped some to Vallejo and some different places among the stores in different towns, some to Oakland, some to Fresno and some to San Francisco, and Mr. O'Connell said, "Isn't the price that these cigarettes were purchased for by your firm unusually low?" to which Mr. Rosenthal said "Yes," that he thought there was something wrong with the cigarettes or something crooked about the deal because he sent his son Joseph Rosenthal to Sacramento to investigate the matter and that he, Joe, had gone there and investigated the matter. That this had resulted in the contract. I believe he showed Mr. O'Connell and myself the contract and I think he also showed us that letter which you read to the jury. I could not say that I recollect any conversation with Mr. Rosenthal in which I said that I would help Mr. Rosenthal to get back part of the money that he lost

(Testimony of Bernard McShane.)

I will say that no such conversation ever happened. Mr. Rosenthal did ask me in the presence of Mr. O'Connell who those fellows were and I told him they were railroad men, one was a switchman and the other a night yardmaster. Then he said, "What property has Burke got?" and I said, "I don't think Burke has any property, but the other man, Young, has got some property." I went to the Pacific Sales Company at Sacramento in regard to these goods and got from them all the goods they had from those shipments and gave them a receipt. Mr. and Mrs. Fitch, or Miss [63] Lewis, or any personal connected with the Pacific Sales Company did not interfere with me in any way in taking the goods from the store. They showed me where the cigarettes were and I told them I would get a truck and take the cigarettes and they told me to "go to it." They gave me all the information that I asked for. They showed me some records that told me the amount of cigarettes they had purchased. They furnished me a list of the different purchases that had been made from these two men but I don't know whether it was a complete list or not, that he has not yet checked up the list of those lost from the car. I have not any record or memorandum of the goods stolen by these two thieves Young and La Vegue, and we have not received all the goods stolen from the Pacific Sales Company. Our Claim Department in San Francisco has this list. I know that in October there were lots of times that cigarettes had been taken out of the cars and when I found

(Testimony of Bernard McShane.)

the contract I went to see Mr. and Mrs. Fitch and they furnished me with a list of the cigarettes they had purchased. I knew there had been stealing for a month, or pretty near a month, or so prior to their apprehension. This is all I know about it. Where-upon witness identifies the list deliverey by Mr. and Mrs. Fitch, which is dated September 30th, and was offered and received in evidence without objection.

Witness further states that he recovered cigarettes other than these here in evidence that he recovered 76 cases in Sacramento and either 48 or 50 cases recovered that we collected and that were in San Francisco at the time we recovered them. Some of them were forwarded to the consignees and others sold as salvage by the railroad administration. The 29 cases in evidence here are recorded on the lists which were furnished the witness by the Pacific Sales Company. The total number of cigarettes shown on that list to have been delivered to the Pacific Sales Company, say 1,443,500, I recovered from the [64] Pacific Sales Company 1,615,000 and 2,528,500 were not recovered.

**Testimony of Dan O'Connell, for the Government.**

DAN O'CONNELL, a witness, called for the Government and duly sworn, testified in substance as follows:

That he was the Chief Special Agent of the Southern Pacific Railroad Comany for about two years; that he had a conversation with Mr. Maurice Rosenthal, November 17, 1919, at 49 Battery Street, San

(Testimony of Dan O'Connell.)

Francisco and that Mr. McShane, Mr. Rosenthal and himself, and a part of the time Mr. Wirtz, manager of the store, were present. Witness then identifies Mr. Maurice Rosenthal as being present in court and continues that this is the same conversation testified to by Mr. McShane, that witness made a note of the conversation immediately after he left 49 Battery Street and got to 65 Market Street, a distance of about two blocks and reduced it in writing and has it with him; that the facts were fresh in his recollection at the time he made the memorandum. Memorandum is a statement of the substance of the conversation between Mr. Rosenthal, McShane, himself and Manager Wirtz. Whereupon witness read memorandum to refresh his memory and stated that it refreshed his memory to some extent. At that conversation he stated to Mr. Rosenthal that he had come there for the purpose of recovering some of the cigarettes that were *stollen* and referred particularly to 50 cases that he wanted them returned. After he had explained that he wanted them returned, that they had been stolen and that they had the men in jail he gave Mr. Rosenthal the names of the men that were in jail producing a contract showing that they had purchased cigarettes under the contract for \$4.50 per thousand. I asked him if he thought that price was not below the market value and he said yes it was below the market value and in view of the fact that he had sent his son Joe Rosenthal to Sacramento to make an investigation of the man or men from whom they had purchased the cigarettes. That his son had

(Testimony of Dan O'Connell.)

gone there and came back with the contract. Witness asked [65] him if he thought there wasn't something crooked about the transaction and he said that was the reason for sending his son to make the investigation. I asked him to what extent the investigation was carried, as I recall that he said the investigation was that his son interviewed this man Burke. He showed me some cancelled checks and I was also shown a slip of paper upon which appeared the amounts of four checks which had been paid for by the purchase of the cigarettes to this man Burke. He also showed me that letter which was presented in court yesterday, written to Mrs. Fitch in Sacramento, instructing her or advising her under date of October 1st to be careful about the purchase of cigarettes. In substance this is about what we talked. He stated he had made one purchase before the contract was drawn up.

Whereupon witness identified contract, which is already set out in this bill of exceptions as Defendant's Exhibit "F." He was also shown the letter heretofore appearing in this bill of exceptions marked Defendant's Exhibit "G." He identified the same.

Upon cross-examination witness testified as follows:

That he met Mr. Rosenthal at the store at 49 Battery Street in San Francisco. His conversation did not indicate that he had been already informed that the thieves had been arrested in the cigarette matter, nor did his conversation indicate that he had



(Testimony of Dan O'Connell.)

known of it. I don't think he was surprised when he saw me as an officer of the Southern Pacific in his office. I came in as a gentleman and handed him my card. I came in as a gentleman and met a gentleman. I cannot say that Mr. Rosenthal did, however, give us any assistance. He did not show us his records and did not answer our questions directly. He said that he made only one purchase prior to the contract being entered into which was October 31st and the record that he presented showed on its face that he had made two purchases at least because the checks which he presented showed the dates October 8 and October 30th. He gave us the record for examination but I [66] do not know that it contained all the transaction. I did not say to Mr. Rosenthal at that time that he had withheld memoranda or certain information nor make any remark of that kind. Subsequent to that time I asked information that I wanted; I asked him for an explanation. At that time he showed me one check. Witness identifies check #1313 for \$1040.00. That he read the memorandum over as late as last night and does not see how he should feel otherwise than friendly to Mr. Rosenthal. Our conversation was a friendly one. After the situation was explained to Mr. Rosenthal he made particular reference to one check, this one for \$2565.00 that had been sent to Sacramento on November 3d. He wanted to know if we thought the check had been cashed by the thieves or if the thieves had gotten the check and cashed it and I suggested to Mr. Rosenthal that he telephone to the store in Sac-



(Testimony of Dan O'Connell.)

ramento to see if the check had been delivered or to interview the thieves about it. I know personally of no conversation that I had with Mr. Rosenthal in regard to any property that either Young or LaVeque might have at Roseville. Mr. McShane and Mr. Rosenthal, I believe, talked it over because McShane had come to Sacramento and he was discussing that with him, but it appeared that the \$2500 was lost as we discovered that the man had cashed it while we were in the store. It was discussed whether Mr. Young and La Veque had any property and I believe McShane did say that one of the defendants had a house in Roseville. Mr. McShane was positively friendly with Mr. Rosenthal on that occasion. Everything was friendly at that time. I believe Mr. Rosenthal left his office to go into the other portions of the building with me and McShane and he pointed out to us the goods that were there at that time. I believe that these 50 cases of cigarettes had come in some days previously and were there on the sidewalk in front of his place of business at 49 Battery Street and that they were redistributed out to the different stores that he had in San Francisco, Oakland, Fresno, Vasalia, Bakersfield and Vallejo, [67] and we had the understanding that the whole of the cigarettes, those 50 cases, had been shipped out. I don't recall that we saw any of the cigarettes in his store at that time. We recovered the 50 cases that he had just received but they were by no means all the cigarettes that had been stolen.

**Testimony of C. B. Leavitt, for the Government.**

C. B. LEAVITT a witness duly called in behalf of the Government and duly sworn, testified in substance as follows:

That he was at the present time engaged in the prune business but in November 1919, he was Assistant Special Agent on the Sacramento Division of the Southern Pacific Railroad; that he accompanied Mr. McShane to the Sacramento store of the Pacific Sales Company at the time he got those cigarettes. Mr. McShane and I went into the store and inquired for the manager and were shown to Mr. Fitch and I also believe we talked with his wife, Mrs. Fitch. At the time we talked to the two of them we asked them if they had bought any quantity of cigarettes from outsiders, that is, anybody but the regular distributors or dealers and they told us that they had. I believe we asked them if they had any contract with anybody for the purchase of cigarettes and we produced a copy of the contract with Burke and they told us they had bought at several different occasions cigarettes from a man by the name of Burke and another man with him. We discussed them for some time and they showed us quite a number of cigarettes they had there. We had them removed the next day. Witness then identified some of the cigarettes in the courtroom which they had removed and continued, that he could not say that the cigarettes were all here in Sacramento at the time he left. Mr. and Mrs. Fitch asked for no proof that the cigarettes had been stolen and they surrendered them to us. We told them

(Testimony of C. B. Leavitt.)

that the two men that stole them had been arrested and were in jail and the cigarettes had been stolen from the Southern Pacific Railroad Company and we wanted them back. I [68] sent a truck down there and we got them with their permission. They told us to go ahead and take them.

On cross-examination witness testified in substance as follows: That he don't know whether the next day was Sunday and they did not get the goods until Monday, but that he does not think the next day was Sunday.

Whereupon the Government rested.

Whereupon the attorneys for the defendant opened their case by calling and having sworn in their behalf, witness HENRY MITAU, who testified in substance as follows:

**Testimony of Henry Mitau, for Defendant.**

That he resides in Sacramento, is a merchant of Mibius & Shirley Company, large wholesalers of groceries and tobacco; that he knows the price of tobacco and what tobacco is worth and did know the same during the months of September, October and November, 1919; that he knows the Pacific Sales Company, has done business with them, and is friendly to them; that he had occasion to discuss tobacco business with them and they were purchasers of Chesterfields, Piedmonts and Camels there; that he knows who Mrs. Fitch is and that she was the manager for the Rosenthals at the Pacific Sales Company during the months of September October and

(Testimony of Henry Mitau.)

November and until the month of December, 1919. Business was entirely with her and Mr. Fitch had charge of the grocery and tobacco department. The price of \$4.50 per M for Chesterfields Camels and Lucky Strikes during the months of October and first part of November of the year 1919 was not an unreasonable price under the conditions at which grocery jobbers purchased at that time from the Government. I had occasion to look up some of the ordinary purchases I made from the Government. These figures and prices I am informed are absolutely conclusive, and within my knowledge and can be verified by our books and also the Government records. Witness then details what he paid the Government for peas, spinach, prunes and other groceries. [69]

On cross-examination witness testified in substance:

That he bought the peas and spinach in the month of May, 1919, at the Navy Yard at Mare Island, but that he bought no cigarettes or tobacco of any kind. He knows, however, that the Government had large stores of cigarettes and tobacco for sale in the month of May 1920; that there was over in Mare Island Navy Yard a surplus of tobacco of 75,368 packages of Omar cigarettes, 20's, 504 packages of Rex cigarettes, 10s, 4736 tins of Holly Granulated Tobacco, 4896 tins of Lucky Strike smoking tobacco 247, Pride of Reedsville tobacco, 2410 boxes of refined smoking tobacco and six cartons of Peiperheidsick tobacco on that date. Bids were asked by the Government for the above tobaccos through notices published pro-

(Testimony of Henry Mitau.)

miscuously. Could not tell whether I received any notices that there were any *sales tobacco* by the Government in October or November, 1919. We received notices of the sale of foodstuff, including tobacco and cigarettes on exceedingly numerous occasions within the last two years. I should judge weekly, and that comprised such vast stores that it goes beyond the comprehension of any business man unless he should happen to be engaged in handling lots such as they. But I am quite sure that there have been a great number of sales of tobacco and cigarettes during the years of 1919 and 1920, but I don't want to say positively; that he knows of no sale of tobacco made by the Government in the year 1920. As a matter of fact we recently have not paid any attention to any of those sales because they are of too vast a quantity. Never bought any cigarettes from the Government himself, nor tobacco during the months of September, October or November. I know what price approximately was paid for Camels during the month of September, 1919; was \$7.30 less 10 and 2%. Chesterfields during the month of September was \$7.50 less 10 and 2%. I do not know that the wholesale price of Fatimas was during the month of September. The wholesale price of Lucky Strikes during the month of September was \$7.50 less 10 and 2%. Wholesale [70] prices were about the same during the month of October but I believe the price was a little more in November. The wholesale price of Omars, Piedmonts and Fatimas during the months of October and November was not \$9.50 less 10 and 2%. The



(Testimony of Henry Mitau.)

Omars are a better grade of cigarettes than Chesterfields, Lucky Strikes or Camels. I purchased no cigarettes during these months. I bought Chesterfields, Lucky Strikes and Camels during those months at the price stated. I bought no tobacco during any of those months or during any part of the year 1919 from the Government and can say that I know of no one else who did buy during that year.

On redirect examination witness testified in substance as follows: When I spoke of those Government sales of clothing I meant sales at Vancouver Barracks in the state of Washington. Practically all of the Government depots, and the quantities are simply tremendous. For instance, bids were called for from the Mare Island division for Government sale of canned meats and bacon. The bacon is 2,144,-692#. The next item is also bacon, 26,000,000# and over.

On recross-examination witness testified in substance as follows: Following questions were asked:

Q. "Will you just come here and examine the condition of those packages. Did you ever see any package in that condition when they were sold by the Government?"

A. I have not seen any cigarettes or tobacco sold by the Government.

WITNESS.—(Continued.) The information I acquired about Government sales was received through notices that were sent to us. Such notices were sent and I took it for granted that such notices were sent to all wholesalers.



**Testimony of Mrs. Rose Fitch, for Defendant.**

Mrs. ROSE FITCH, a witness called and sworn in behalf of defendant, testified in substance as follows

That she resides in Wheatland [71] where she is in business with her husband; that she resided in Sacramento during the months of September, October and November, 1919; that she was manager of the Pacific Sales Company at Sacramento with her husband; that she knew a man by the name of Burke and also a man by the name of Young, each of whom were on the stand the day before and she recognized them; that she saw them in the office of the Pacific Sales Company in the first part of September, 1919. If witness remembers correctly the two men came in together and they asked for the manager and I suppose one of the clerks pointed me out so I was called somehow. One of them spoke to me about selling tobacco or having some for sale and I sent them to my husband. It was the customary thing for people to come in with goods to sell and as a rule we would send them to Mr. Rosenthal in San Francisco, but these men did not seem to be able to go to San Francisco, so I listened to them and one of them gave me a price which was not worth bothering much about. They asked me \$6.00 per M. I said the price was not worth bothering about because we were only paying \$6.50 and could phone our stores at any time that we wanted them and get them at that price. We ordered every morning tobacco and cigarettes, just going to the phone and ordering. At that time my

(Testimony of Rose Fitch.)

husband was present during the conversation I had with Mr. Young or with Mr. Burke. Those were the names that I knew these men by. I cannot tell who did the most of the talking. We were both together, but I have a great habit of butting in. It was around September 10th when those men came into the office. We had a conversation with them about the same of some cigarettes and tobacco. We did not buy any tobacco at that time because they made the price \$6.00 and I told them we were not looking for a bargain of that kind. They were just ordinary business men like I meet every day. Whereupon the following questions were asked:

Q. How did these men impress you? How did they appear to you—did they appear to you like honest or dishonest men?      A. Far from that.

[72]

Q. Give us your ideas.

A. They were just ordinary business men to me.

Q. There was nothing suspicious about their appearance or their manners?

A. Absolutely no."

WITNESS.—(Continued.) The next morning they called again. I remember how they went away, so nicely with smiles, when they were turned down the day before. This Mr. Burke was always a gentleman from the start. They came back the next morning and came in the same way they had gone out of the store. Mr. Young did not come back the next day. Mr. Burke came back and called me and my husband again. We talked it over again, and

(Testimony of Rose Fitch.)

I don't know how, but we got down to \$5.00. I don't know who it was that mentioned the \$5.00, but that was the price agreed upon. Then I called to the phone Mr. Rosenthal, Mr. Burke waiting all the time for the answer there, and Mr. Rosenthal said that if they were all right to go ahead and buy them, when I told him the amount they wanted to sell and the kind of cigarettes. I mean by all right, if they were in good order. He didn't want me to buy anything that was stolen. We told Mr. Burke to bring in the cigarettes, and I don't remember of seeing the cigarettes brought in, but I think they were brought in and stored in the back room. Mr. Rosenthal told me I could pay them out of the cash register. While this conversation was going on Burke said to me and the bookkeeper, Miss Lewis, and my husband, and he seemed so nice and honest all the time. All the time that we were coming to this understanding there were hundreds of customers in the different parts of the store and they paid no attention to Mr. Burke, he looked so honest. I was talking with him and he seemed to me that way, so I guess he took me off my guard. That was the first purchase we made with these men. It must have been two weeks afterwards before we made another purchase. If I remember correctly at the second time these men came in Burke stayed and waited for me. There was absolutely nothing in this that seemed to look anything [73] out of the ordinary. They came in and offered me Lucky Strikes the first time they

(Testimony of Rose Fitch.)

came and these cigarettes are very good cigarettes. If they had come in and offered us only something else that would not have sold so well, that we did not want, I would have turned them down. Then they came in with some Camel cigarettes, and those are very good cigarettes, and I just did not turn them down. We made purchases since that time. I made up my mind that second time that I didn't want what they offered, and didn't give them the price they asked, for the reason they did not get that price was that they offered me some Lucky Strikes, and Lucky Strikes did not have any commercial value to us. This was my second transaction, but after that we had more transactions. I recall when Joseph Rosenthal came up to Sacramento we had a conversation with these men, before that time, and I had that letter that was read in court yesterday from Mr. Rosenthal. This was the third transaction we had with these men. This letter came in, I believe it was the week before Burke came in for his money and I had it on my desk. That was the first time that I was really surprised at Mr. Rosenthal that he should think anything was stolen or anything like that, or dishonest, so I left it there and waited for the men to come in again. They came in from the rear end of the store and the groceteria, and I tried to tell him in a nice way, as I possibly could tell him, why Mr. Rosenthal was suspicious. I talked with him as nice as I could about the letter and took it to him and he looked at it. He always looked to be such a nice,

(Testimony of Rose Fitch.)

straightforward man that I was sure of him. To-day I cannot tell you why I trusted him that way. He was such a gentleman all the time that I really felt sorry, and I knew that Mr. Rosenthal did not know, or else he would not have written in that way. This letter contained a request that I find out if the title to these cigarettes was all right. Mr. Burke, in my presence, wrote the sentence, "I have a clear title to these cigarettes. F. W. Burke." I had all the confidence in the world in Mr. [74] Burke, and never thought of a thing like this because everything seemed so honest and so regular to me. They had sold us cigarettes and had waited almost a week for their money. They were in the store at times. Mr. Joseph Rosenthal came up about the end of every month. He always telephoned to me before leaving San Francisco. He had never seen or heard of them before. He had a talk with Mr. Burke, or with Mr. Young, when he arrived from San Francisco. He and I went to lunch at the Travelers' Hotel and we never mentioned cigarettes, not that I can think of now. Mr. Joe Rosenthal and Mr. Young or Mr. Burke were together, both came in in the morning. They both did the talking. Mr. Young got indignant when Rosenthal said something about wanting to know if they were all O. K. and if it was honest or about a clear bill of sale, etc. Young was the one that got indignant. Mr. Burke never said anything, and was always nice and sat there and listened to the conversation. I heard the conversation between



(Testimony of Rose Fitch.)

Mr. Joe Rosenthal and Mr. Burke. It was also heard by Mr. Young who got very indignant and turned to Miss Lewis and asked if he did not look like an honest man. Mr. Rosenthal spoke about making a contract and he wanted to find out how much they had to sell. On that day, we had just shipped a big lot of these cigarettes to other stores. Then he went ahead and made the terms of the contract and I know that Mr. Young said something about the terms, but I really could not tell you much about it. There was no contract at that time. I heard a conversation between Mr. Young and Mr. Burke and Mr. Joe Rosenthal in regard to the terms and the time. It was going to be delivered in two shipments and going to be paid in three different payments. Mr. Burke or Mr. Young spoke about those shipments and terms. The terms were made up during the conversation while I was there. Mr. Young suggested something and Mr. Burke suggested something and Mr. Rosenthal suggested something. We went to lunch, Joe Rosenthal and I, and while at lunch Mr. Rosenthal put in a call for his father; said he would not [75] make that contract without telling his father, and then after lunch and after the telephone call we went to one side in the hotel and a public stenographer wrote it up while we sat there and waited. She took the dictation right on the machine. Mr. Joe Rosenthal in my presence dictated the contract to the public stenographer. The contract was then taken back to our store in Sacramento where we met only Mr.



(Testimony of Rose Fitch.)

Burke at the time the contract was signed and agreed upon. Whereupon the following question was asked:

Q. "When you had the largest transaction with Mr. Burke, you got a receipt from him?"

A. I always demanded—it did not make any difference who it was—we demanded a receipt and we always got a receipt, too.

Witness then identifies the receipt signed by Mr. Burke which he dated September 7th and signed in my presence. I wrote this part at the bottom and forwarded it to Mr. Maurice Rosenthal. This part that I wrote on the bottom is, "It is all right." I could not tell you how many times I saw Mr. Burke and Mr. Young after that, but we had a number of transactions with them and I was present at all the conversations we had with them. I never even thought of these goods being stolen until Mr. McShane and another man called. I remember it was just after 11 o'clock in the morning, on a Saturday morning. Some of the girls came in at 9, other at 10, and some at 11, because of the eight-hour law, and we kept open store until 10 o'clock at night, so I had a lot to do to place all my girls and get them straightened out. I remember they came in after 11 o'clock, because all the trouble started then, and it was a terrible shock to me. I remember distinctly, as though it was yesterday, that Mr. McShane pulled back his coat, and I remember seeing his star. Naturally, after, he got to talking; I wanted to know how it all came about,

(Testimony of Rose Fitch.)

This was the first time I knew the cigarettes had been stolen. McShane told me that it was stolen property. I could not tell now whether Mr. [76] McShane or the other man. Mr. McShane and his detective told us they were stolen, and how they were stolen and all about it. I was absolutely thunderstruck. Even when they got to talking I could not get it fixed in my mind what they were telling me. But those men said this was stolen goods and I took Mr. McShane back and showed the goods in the back of the store immediately. We even sat in the grocerteria and talked of other things. Mr. McShane asked me if we left the stock lying around in the grocerteria, because he said he thought people would steal it. I gave Mr. McShane all the assistance required of me. I know this was on Saturday, and I was very busy, and it was my husband's lunch hour. When he got back, I told him all about it, and even at that time we both of us were very surprised at Burke or that he should have sold us stolen property. McShane and his assistants must have taken the goods out a couple of days later. My husband and I talked it all over, talked about Mr. Burke and wondered why he had treated us like that. I went over to the banker and asked him about this man, and what made it so hard was that they told me that they had different names, that the name of Burke, the one he had given us in store, was not his real name. After I had told the banker about it I then came back to the store and later went down to the station-house where the

(Testimony of Rose Fitch.)

trains come in. I did not see McShane. I went to see the superintendent or something like—I don't know in what office, but anyway they called up Roseville, and that is the first time that Roseville was ever said to me. Whereupon the following question was asked:

Q. "Can you recall from your memory what name the man known as Young gave you on the first transaction?"

A. Always he was "Young" and I always thought of him. I really did not pay any attention to Mr. Young, because he was only supposed to be a friend of Mr. Burke. I never really had any dealings with him.

WITNESS.—(Continued.) I think I never saw the signature [77] of "McAllister." I always got the instructions for the receipts from them, and I never questioned them. I took it for granted and Miss Lewis took it for granted and that is how the receipts were made. I had a conversation with these men wherein they received the check from me and there was a difference to be made up. My husband claimed that Burke had offered us the cigarettes for \$4.50, and I was pretty sure that Burke had said \$5.00, so I wrote to Rosenthal to make the check for \$4.50, and if there was any difference I was to pay it out of the cash, which I did. They came in and we did not question it at all, because Mr. Burke was always so nice about those things. He always wanted to have everything O. K.

**Testimony of Arthur Frank Fitch, for Defendant.**

ARTHUR FRANK FITCH, a witness called and sworn in behalf of defendant, testified in substance as follows:

That his name is Arthur Frank Fitch; that he resides at Wheatland, and is in business there; resided in Sacramento in September, October and November, 1919; is one of the defendants in the case and the husband of the lady who was just on the stand. In September, October, and November, 1919, I was general manager of the Pacific Sales Company. My wife was the real manager, and I had a department in that store. The Pacific Sales Company is a general merchandise store, owned by Mr. Maurice Rosenthal, who was living in San Francisco at the time. As one of the managers of the Pacific Sales Company, I remember meeting a man by the name of Young, who was on the stand yesterday. This was during the month of September; I met him at the store of the Pacific Sales Company. He came in here with Mr. Burke. I think my wife was there, or I was called up there by her, and they said something about having cigarettes for sale. The man Young made the price, and I naturally took it for granted, by the way they talked, that they were honest and everything was in legitimate order. The terms did not appeal to me to be right, but he had a large quantity to dispose of. I could not see my way [78] to handle the cigarettes for cash for them and the price did not appeal to me, so I told them at that price I could not handle them

(Testimony of Arthur Frank Fitch.)

at all. Mrs. Fitch, who was there, did not know much about the prices of these cigarettes and the first transaction, and we, as employees of the Pacific Sales Company, had nothing to gain and they everything to lose if the deal was not of the highest order. Both my wife and I did the talking and I refused their offer of \$6.00 per M., as I did not consider it anything much and turned it down. They went away and evidently thought better of it and eventually came back the next day, I don't recall now, but I think they said that my price would be accepted. Mrs. Fitch and I said we would have to notify San Francisco, before we could take action on the deal. San Francisco was notified, and they said, "Yes, go ahead." They told us if it was all right to buy the cigarettes. Our instructions came from San Francisco. The following day we were to receive the cigarettes at \$5.00 per M. I do not recall the day upon which the conversation was had, but they delivered the goods on the next day after that, and we paid them the afternoon of the same day. I received the goods myself. At that time I was on the sidewalk and I received the goods on the sidewalk, and trucked them in. There was an order out from the headquarters at San Francisco that managers must receive all goods and see that they are correct. I don't know; anyhow, I suppose they were turned over to one of our men and they trucked them in in the regular way. I checked them off, but I think there was a discrepancy in one of the cartons, where it had been torn open and



(Testimony of Arthur Frank Fitch.)

some of the cigarettes had been removed. I called Mr. Burke's attention to this, and they took them out of the cash. The next transaction was a week or two afterwards, and we bought more cigarettes. It seems that the price was not right, or that there was something about these cigarettes because I talked it over. They were business men the same as you meet every day in business. When they delivered the goods they were dressed in overalls, and I remember distinctly that I thought they were very energetic in delivering their own goods [79] and wanting to get ahead. When these men came in with the goods their appearance and dress struck me as being that of good business men, right from the first to the last. There was nothing in their appearance on the second transaction to form any suspicion in my mind. We had several transactions with these men before Joe Rosenthal came. I made the deals and it was turned over to the office for them to make payments. Whatever I did was to make the deal and to give receipts, to check the goods, and to see that the cigarettes were delivered and taken into the store in the right way. Some of the goods were paid for by check. I think three or four shipments. This happened in line with our policy to pay everything by check. That first transaction, when cash payment was made, I think was an exception. All I know about this thing is I took it for granted, and everything was done in a business-like manner to the best of my knowledge and belief.



(Testimony of Arthur Frank Fitch.)

I never dreamed they were stolen goods, because the men looked honest to me. My wife engaged in all the transactions except the one Mr. Rosenthal had, and only in the interest of the firm. I was present when Joe Rosenthal came in and had a conversation with these men or one of them. Myself, my wife, and, I think, Miss Lewis, was there. They started a conversation in regard to these cigarettes and I figured that this is none of my business, that San Francisco was handling the deal by itself, and I think about that time somebody handed me some papers, and I was called away. I was not present when the terms of the contract were discussed, but I signed the contract as a witness for the Pacific Sales Company. At no time from first to last did anything happen, nor was anything said by these men to create the slightest suspicion in my mind. I was first informed that these goods were stolen when I came back from lunch. I don't know whether my wife told me or Mr. McShane. That was all in his hands and he said they were stolen goods. Mr. McShane was present at the time. Evidently he thought that we knew and that Rosenthal had taken them and knew that they were stolen goods, and they belonged to the railroad company, but I [80] want to say that I never dreamed but what everything was all right or I would have turned them down flat. Mr. McShane said he would send a truck for the goods and I made out a receipt and McShane signed it. The goods were eventually delivered to Mr. McShane. I gave Mr. McShane

(Testimony of Arthur Frank Fitch.)

every assistance that he required at that time, and went with him and we went all over them and made out the receipts. There was nothing concealed from McShane. The price agreed upon on the first lot was \$4.50. On all goods bought after that I believe the contract stipulated was \$4.50. I think that Burke had a few Fatimas, and Piedmonts, and, if I recall right, he did not want to wait for a contract on them as he said he only had a few and would sell those Fatimas along with then cartons of Chesterfields and Camels, but he was to be paid the money for them. I don't remember the price.

On cross-examination witness testified in substance as follows: I was general manager for the Pacific Sales Company and had jurisdiction over groceries and tobacco. I met Mr. Young and Mr. Burke early in September; I believe both of them were together. I don't remember which one I spoke to first when they came in. The first thing was they were inquiring about the prices and I never asked them for any references, because I thought that they had got a shipment of cigarettes and wanted to sell them. They said they had cigarettes for sale, and they mentioned the quantity, and I said, "What is the price?" I don't remember how many cigarettes they stated they had, but I think about twenty cartons, which would be 200,000. To the best of my belief, they both discussed the prices of cigarettes and the terms were made. I cannot tell you what all of our dealings were. Mr. Burke did most of the dealing, and Young was brought along as a

(Testimony of Arthur Frank Fitch.)

friend and assisted him. Burke went ahead and we did practically all of the business with him. Some substance of the business was transacted with the other man, but Burke was the one we looked to. It is impossible for me to remember whom I negotiated with. I have so many goods to handle, [81] and papers to look after, that I cannot remember each transaction. I did not say both of them came back, but the one came back the following day and they agreed to the price I have stated. I would naturally have to ask if they accepted that, and it is my mind that they were agreeable to it and I naturally thought it was all right to go ahead and make the deal. I checked them off as they came in, but the office knows what amount was paid. Whereupon the following question was asked:

Q. "Had you ever in one transaction purchased cigarettes under these circumstances?"

A. I think some from Getz Bros."

WITNESS.—(Continuing.) I bought cigarettes before in Sacramento, not in these quantities; nobody there would have that large quantity, but I would not have to pay that much for them. We bought a large quantity of cigarettes from these men, don't know the amount, whatever the record stated is correct. The firm has all the records as far as I know. Personally I have not. We did not have a bill of sale as each delivery came in. We were receiving goods every day, and required my attention, but I did not worry about bills of sale. I had never met either of the gentlemen before they

(Testimony of Arthur Frank Fitch.)

came into the store. I did not find out where they banked. I asked them for no references, but took it for granted they were business men. Whereupon the following question was asked:

Q. "Did you ask for any guarantee after the contract was executed?"

A. Before that. They turned the goods over to us and gave us an opportunity to make an investigation. I understood it was to be one-third paid before the day of making delivery."

WITNESS.—(Continued.) Probably they could make deliveries the same day. I don't recall. There was a bill of sale put in. I heard that we could not pay for the goods without a bill of sale. I don't know where it is, but when the price was fixed to be paid, that was done in the office and after that I could have no idea. I know a man brought them and when they signed [82] the contract I figured that they were entitled to and I gave them a receipt when he came and got the money. I was in charge of tobaccos in the office, and I bought the cigarettes and didn't want to see the bill of sale. Whereupon the following question was asked:

Q. "Did you buy two or three million cigarettes without seeing any bill or sale?"

A. I don't believe there was a million cigarettes—yes, certainly.

WITNESS.—(Continued.) The man would come in and get the order and that finished the transaction. When they would come in we would have a conversation and they would inquire about cigar-

(Testimony of Arthur Frank Fitch.)

ettes, and we would arrive at the price and I would tell them to send the cigarettes up. I was interested in these men and did not think they were stolen goods, or I would not have entertained the idea of buying them. Whereupon the following question was asked:

Q. "Can you give us anybody else that you bought that number of cigarettes from?"

A. The wholesale houses. I do not know them myself, but in this particular case, this was an exception. If it was not an exception I would not be here now."

I think Mr. Burke signed a bill of sale, because he was the head. No doubt the name McAllister was used. I heard so afterwards. I saw this sidewalk delivery. I examined the packages when they came in only casually. I just looked at them after the receipt, and that looked all right. Furthermore, if there was any discrepancy, as I told you, and there were some cartons with some cigarettes missing and they were called to my attention, and that made me think they transacted business in a fair way, so I did not think it did me very much good to look at the packages closely. I was very busy with my own department and never gave so very much time to this cigarette deal. [83] That package on top there, I don't think was in the same condition as it was when they were delivered to the Pacific Sales Company. The remainder of the packages are in the same condition. I don't think I noticed any mark on any of these packages. In fact I did not



(Testimony of Arthur Frank Fitch.)

look for any marks. I did not notice that the holly strips around these packages had been removed. I saw a large quantity of Camels and Chesterfields, but none of these. The Camels and Chesterfields were so popular. I looked at the Chesterfields packages and checked these up for a deficiency, but never looked for any marks at all. We thought it was so legitimate that I did not think it necessary to do that. We have never had the cigarettes delivered to us in that condition with the scratches on them. I don't know as I would notice that until you called attention to it. As a rule, they were stacked up in 5 M in a big block. It is now clear to me that there has been something scraped off the brands of the packages. I don't think I had the package in the store very long. The delivery started in the middle of September and ended in October, I suppose. We had these packages coming into our stock for a period of about two months, and in all about four million cigarettes were delivered, and if I ever noticed any of these marks before I did not pay any attention to it. They were packed up in 5 M to a package and I might have noticed that. Furthermore, during the conversation with Mr. Rosenthal it refreshed my recollection about the goods being scratched up, but the contents were not. These were not packed up or stored in packages of five. When we received them on the sidewalk we trucked them in and we then packed them in packages of five and I only looked at them casually. I did not notice any brands or marks on them. I did not think there were any goods like this

(Testimony of Arthur Frank Fitch.)

or anything wrong with them. I thought it was a legitimate deal so why should I expect it. I would not necessarily wait to see when I ordered Chesterfields or Camels that I got Chesterfields or Camels. I receipted for the cigarettes and the office did the rest. If it was Camels one time it was Lucky Strikes the next delivery. I [84] checked them all up to see that they were delivered and it was all entered in the receiving book and the record will show you what we received. I never identified either of these men to any of the bankers here. I think they brought back the check for identification or something and I signed it, or else the bank called up. I made no inquiries to know that that man was Burke. I was present at the commencement of the discussion of the contract, but may have gone in the office afterwards. There were freights that demanded my attention elsewhere. I did not go to lunch with Joe Rosenthal and my wife. We could never go only one at a time. My wife went with Mr. Rosenthal, and I did not. I heard the terms of the contract to this effect, it was to be made in three payments. I do not know whether it is authentic or not, I could not say. I believe I read the contract; I cannot say, but don't know the exact substance. I suppose I may have read it. I know I signed it.

On redirect examination, witness testified in substance as follows:

The money was not paid for these cigarettes at once on their delivery. When they were received I

(Testimony of Arthur Frank Fitch.)

notified them in the office to that effect and they sent out to San Francisco and told them how many were delivered and the money was sent for the goods. My wife did all of the telephoning. I was not there. Don't think I asked Mr. Young or Mr. Burke where they resided although I may have done so. The conversation where they lived was gone into and they stated something. I saw both the contract itself and the letter that was written one month prior from Maurice Rosenthal. Our records do not show the address of these men at all. Whereupon witness' attention was called to Defendant's Exhibit "G" and he testified that it was the letter that he saw. By reason of that letter I never requested an affidavit from either one of these men. I thought that was sufficient when the man gave us his word to that effect, and we took it for granted that was all that was necessary. I could not tell [85] when I first saw this letter. It came in the ordinary course of events through the mail and it was opened. I suppose it was received on October 1st, 1919, as it is dated that date. Whereupon witness was shown Exhibit "F" and asked whether this is the contract that he saw and he replied, "Yes, that is your contract." I suppose my signature on the bottom as a witness and the date shows October 31st, and Mr. Burke gave his address as Gerber. I attended to all of the shipments of cigarettes to San Francisco. They were shipped by the Capital Van or another railroad. Whereupon, certain shipping receipts were shown witness and he was asked if he could

(Testimony of Arthur Frank Fitch.)

identify them and he replied "Yes, that is them." All the cigarettes that I shipped to San Francisco were shipped in open and ordinary transportation. I am now in business at Wheatland with my wife, in a general merchandise establishment and have been there since the 2d day of January, 1920, and have no business connection with the Rosenthals at the present time, nor have I had since I left their employment. We never have a thing to do with them, and my business to-day is owned by myself and wife. The Pacific Sales Company, or Mr. Rosenthal or his son, own no interest in our concern. I have not had any interest in the concern of the Pacific Sales Company or the business conducted by the Rosenthals except the interest of an employee on a salary basis. I never did have any interest in the Pacific Sales Company at all. I was only a salaried employee and my wife was only interested as a salaried employee.

**Testimony of Estelle Lewis, for Defendant.**

ESTELLE LEWIS, a witness called for the defendant and duly sworn, testified in substance as follows:

That her name is Estelle Lewis and resides at Santa Rosa and has resided there since February, that she was employed at the Pacific Sales Company in Sacramento from July of 1919 until the first of the year, 1920, as head cashier and bookkeeper. That she knows Mr. Maurice Rosenthal and Joe Rosenthal; [86] that she is now in Maurice Rosen-

(Testimony of Estelle Lewis.)

thal's employ and has been at all the times mentioned in her testimony. As chief cashier in the Sacramento store I had charged of all books and the cash and records; that she remembers the transaction first had with the man by the name of Young and also by the name of Burke. I remember they were paid in cash. I remember them coming in because I handed them the cash and I think they were dressed ordinarily. There was nothing remarkable about their dress. There was nothing about their appearance or dress or manner that indicated any suspicion in our minds. On the first transaction I gave the money to Mrs. Fitch and was present when Mr. Burke and Young received the same and made a record of it. This record is always sent to the head office. We always keep a cash-book and the cash-book and records we send to the head office have to correspond. This transaction occurred in the ordinary course of business. There was no discrepancy about it or anything of that kind. Whereupon witness identifies certain books and testified as follows: "This is the receiving-book, this the cash-book and this is the stock-book. The transaction to be entered in regard to these packages would be in the cash-book, because it was a cash transaction. It was September 14th and is found in the cash-book in Mrs. Fitch's handwriting and it is for Camel cigarettes in the amount of \$597.00. I was ordinarily in charge of the said books and this entry evidently was not made in the stock-book or the receiving-book and was not transferred to the cash-book. The record would



(Testimony of Estelle Lewis.)

be duly recorded that way to the general office in San Francisco and this was so reported. This transaction was handled in the ordinary course of business. No secrecy or concealment. I think the second transaction was made also in cash, on the 27th day of September, 1919, in the amount of \$720.00. It is entered in the book in Mrs. Fitch's handwriting and duly reported from there to the head office at San Francisco to Mr. Maurice Rosenthal. Mr. Fitch kept the stock-book identified by witness as the receiving-book. It was in my office but I did not have charge of it. I was in the office most [87] of the time and handled all of the cash. I was present at the conversation when they, Young and Burke, came in and they were talking there but I don't remember much about it. There was once when they were talking about a check coming up and we had to pay the rest in cash. I think it was \$100, but cannot remember the figures exactly. There was a part to be paid by check and the balance paid in cash. Young and Burke divided the money in the office. There was nothing about either one of them that indicated that there was any dishonesty. They were not in any hurry; they seemed to take plenty of time. I recall Mr. Joe Rosenthal coming up and was present during part of the conversation held there. I heard some of the conversation, was sitting a little away from them just a few feet. There was a question in the morning here with these men in regard to a contract. I remember they discussed the contract, Mr. Burke and his friend; Mr. Joe Rosen-

(Testimony of Estelle Lewis.)

thal and I think Mrs. Fitch was there. Joe Rosenthal was talking some about the payments and Burke's friend objected to part of it, and became very indignant about something. He wanted two payments, or something like that, but then Mr. Burke calmed him down a little bit and they agreed to come to the terms suggested by Mr. Rosenthal. There was something said by Mr. Burke and Mr. Young in regard to giving a bill of sale at the time of delivery or payment of the goods. I think they were going to put it quite a few weeks later. I know they were going to pay it at a later date and they were to make two deliveries, I believe and three payments. At first in regard to the payments at a later date it was not satisfactory to Mr. Young but after Burke had talked to him he finally agreed. I think the payments were to be made several days after, but I do not know when the goods were delivered. All that I knew was when they called for the money and when the goods were delivered, I don't know. [88]

On cross-examination witness testified in substance as follows:

I have the ledger showing these transactions. Whereupon witness allowed counsel for the Government to see and examine it and calls attention to Mr. Burke's accounts and identifies them as being "where all these crosses are." I kept no separate ledger account. Whereupon witness indicated the cash-book and showed the attorney for the Government the first transaction with these men, and fur-

(Testimony of Estelle Lewis.)

ther testified that this particular entry is not in her handwriting; that she kept the books but that was made in the evening and possibly Mrs. Fitch filled it in for me. We were very much rushed at that time. The book does not show to whom this \$597.00 was paid. It shows what it was for; it was mostly for cigarettes. I merely balanced the cash, we had to balance it every night to show whether there was money coming in, money going out and money on hand. Not all of the entries are made in my handwriting, but all the entries concerning Young and Burke were in my hand writing in the stock-book. Witness identifies the instance in which the handwriting was Mrs. Fitch's and the handwriting which was her own. The transaction was merely entered and not the name; names are entered in the stock-book. When we have an open account we do not keep a ledger account at all, merely keep a record, because we send all our reports to the head office and the real books would be in the main office at San Francisco and I presume there would be an account under the name of F. W. Burke or under whatever name it was at that office, covering all the transactions we had with these men, but I don't know because I have never seen it. The book called the journal is for goods received and is in my handwriting. The item for \$1040.00 was paid by check. There was no payment in cash, it was paid by check, which I would not put on the cash-book. The stock-book does not keep all records of the trans-

(Testimony of Estelle Lewis.)

action. Whereupon the following question was propounded:

Q. "This is not a complete record of all the transactions? [89]

A. All that came by check. The first transaction shown here is dated October 8th and the entry is by a transaction with Burke. All the other transactions were entered as Burke. Witness stated the other transactions or entries made prior to October 8th are in the cash-book but no name put after it. Whereupon the following questions were asked:

Q. "Show me in this book the transaction covering the 39 cases of cigarettes.

A. If you tell me what the date was.

Q. On or about November 10th or 11th.

A. The 11th, that was Sunday, evidently, because it is not in here.

Q. See the 12th then.

A. No, this is the cash-book and that was not for cash.

Q. This is one for cash.

A. I don't know about the other entry, if it was paid for.

Q. Were part of the goods delivered at that time paid for in cash?

A. I don't remember, if it is not there."

Witness was directed to examine and ascertain all the dates beginning with November 10th up and including the 12th, and stated that there was no transaction in there, that there is nothing there to show any cash payments at all, that the goods that came

(Testimony of Estelle Lewis.)

in were paid by check and showed on the stock-book. The entry on the stock-book dated November 10th, F. W. Burke, \$467.28 was made at that time and is my handwriting. All these entries are made from invoices or receipts in the form of an invoice and the invoice is O. K.'d by Mrs. Fitch and left on my desk and then I entered them in the stock-book. Everything was O. K.'d by Mrs. Fitch. When there was no cash paid out we made no entry in the cash-book, but if cash was paid out at all, I would make an entry. [90]

**Testimony of Joe Rosenthal, for Defendants.**

JOE ROSENTHAL, the defendant, was called as a witness in behalf of the defendants and duly sworn, and testified in substance as follows:

That he is the son of Maurice Rosenthal and is the general sales manager of his father's firm of the Pacific Sales Company. That he worked during the month of September, October and November in the year 1919. That he will be 24 years old in a short time. We have a chain of general merchandise stores in all the various cities along the coast, eleven in all, besides our main office. We handled practically everything in the general merchandise line, which is naturally groceries and tobacco. We have a little of everything in all lines. We have stores in Bakersfield, Visalia, Fresno, Stockton, Santa Rosa, Vallejo, Sacramento, Oakland and two stores in San Francisco and our main offices and warehouse. Our concern at Battery Street buys most of the goods



(Testimony of Joe Rosenthal.)

and we ship them to the stores, that is, with the exception of groceries and tobacco, which they buy from jobbing houses in the towns they are in mostly. On December 1st of last year and the first of this month there were purchased about \$3,000,000 worth of general merchandise, groceries and tobacco. I have the statement covering these purchases segregated by months. From December 1st, 1919, to the first of this month we have purchased in tobacco \$450,316.54, an average of \$35,000.00 per month. A large portion of this, about 60%, is in cigarettes. My attention was first directed to the purchase by the Fitchs of these cigarettes involved in this case around September 12, 1919. My attention was called to a telephone call by Mrs. Fitch to my father, in which she asked him if she could purchase some cigarettes which she had quoted at \$5.00 per M, and my father asked me—I was then in the office at the time—if \$5.00 per M was a good price on Camel cigarettes. At that time Camel cigarettes were costing us \$6.35 with a discount of 10% and 2%. We have purchased cigarettes from Bollman & Company during the entire year and have been allowed by them 10% and 2% discount. [91] That day Bollman said that cigarettes were \$6.00; that was in November, less 10% and 2%, and the cigarettes would net about \$5.30. This purchase of September 14th, of Camel Cigarettes, came to my knowledge at the end of the month. Nothing came to my knowledge until the next time I was in Sacramento, that was the end of September. I generally went up at the end of every month to

(Testimony of Joe Rosenthal.)

prepare the sales and start the next month. I was up there around the 29th of September. I first spoke to Mr. *and Fitch* about it after supper. I generally used to come up on the evening train getting in there about 5 or 6 o'clock and after supper we would go back to the store, and I noticed some of the cigarettes there. They told me that they had been buying them from a man by the name of Burke. I noticed the word "P-I-E-R" was on one case and word "W-A-S-H" on another. I asked him if they were not Government cigarettes, because I had proper reason for figuring that they were Government goods, because in the latter part of last year at Fort Vancouver Barracks I had personally figured on a large quantity of groceries, tobacco, clothing and shoes and camping utensils which the Government had for sale. They had in the neighborhood of \$100,000.00 worth of tobacco which I figured on in conjunction with Sugarman & Greenburg, and Mr. Greenburg himself made several propositions to buy clothing. I had an idea that those were some of the lot of tobacco which was sold by the Government up there. We didn't get this tobacco. It was sold to Heckfeldt Bros. of Seattle rather cheaply, it was all offered together, and Hackfeldt Bros. bought this tobacco from the Government at approximately sixty cents on the dollar. About 85 cents on the dollar for the biggest part of them, brought it down to 60 cents on the dollar. I personally bought some of the tobaccos from that firm. They offered some Old English Curved Cut Tobacco which was from this spe-

(Testimony of Joe Rosenthal.)

cial lot up north, amounting to about \$5,000.00 worth and I had a list at that time. That tobacco was selling at twenty-three dollars a gross and they offered me that at \$1.40 a dozen, less 25%, which is less 10 and 10 and 5, but [92] as the lot was too big for me to handle of this particular brand of tobacco, I called up Harris & Company of San Francisco, who are associated with Ehrman, and I am not sure but I think they bought it all. I bought some of this firm Harris & Company under date of June 23d, 1919 at \$1.44 per dozen, less 10 and 10%. The market price at that time as \$23.04 a gross as given by the approval from the American Tobacco Record. I secured a bill from the United States Spruce Corporation at Vancouver. The Government was selling tobacco and some other goods at a discount. Here is an invoice from the Government for 34,000 dollars worth, of general stores issued from Vancouver in July, 1919, where they allowed a flat discount on their goods of 30% and even over that. We have bought goods from the Mare Island Navy Yards, one bill dated May 11 of this year, for groceries and cigarettes, 75,226 packages, which goes to two big wholesalers and we subsequently resold them to different people at  $10\frac{3}{4}$  cents a package. We did not purchase from them, not of this lot. I purchased some of them from Joe Lieberman in a small lot and paid  $10\frac{3}{4}$  cents. I have not purchased tobacco from the Government prior to last year, with the exception of that which was Government property. We purchased from the jobber. My concern

(Testimony of Joe Rosenthal.)

got bids right here from the Government at Mare Island wherein we bid. These were accepted on March 23d, of this year. We had no bids in prior to that time. When I saw the cigarettes, I spoke to Mr. and Mrs. Fitch and they were of the same conclusion I was. The next time I returned to Sacramento was about October 30th. We went to supper and then we came back to the store and it seems that day Burke had been in there and left a big lot of Lucky Strike cigarettes which I saw in the store and Mrs. Fitch told me that Burke had said to her that he wanted to see me or that he had a lot of cigarettes, about two millions and a half, which he wanted to sell. She told me he was coming in that night and that I was to see him in the morning. She also told me that she [93] had spoken to Mr. Mitau. The next day I saw Mr. Burke and Mr. Young. About 11 o'clock in the morning they came into the store and Mrs. Fitch took me over to them. We went into her office. Mrs. Fitch, Mr. Burke, Mr. Young and Miss Lewis were present. Then I asked Burke how many cigarettes he had to sell and he told me he had in the neighborhood of two to two million and a half, but did not know exactly how many, but he might have a little bit more than that. I asked him how much he wanted for them and he said \$4.50 per M. and then I asked him where these cigarettes were located and he told me Roseville. I told him that that was a pretty big lot of cigarettes and I asked him if he could split them up in delivery and also in payments of the same. He said he was willing to do so as he

(Testimony of Joe Rosenthal.)

was not in a hurry for the money. I suggested to have at least two deliveries, one on short time or at once and one at the end of the month. I told him that I might be able to make the payments in three installments, one-third on December 1st, one-third on December 15th and one-third on January 1st, but Mr. Young objected saying that the payments should be made in two instead of three installments and Burke finally decided that three payments would be satisfactory. I then asked him if they came by these cigarettes legitimately, at which Mr. Young grew quite indignant and said he had come by these cigarettes legitimately because if he had not he would not have been willing to extend the time and credit to us and that the very fact that they had such a quantity of cigarettes as they did and that they were willing to give us time should assure us that they were legitimate. I asked Burke if he would be willing to guarantee to us that he obtained these in a legitimate manner, that is, if he would give us a clear bill of sale with each one of the deliveries and would guarantee that these cigarettes were not obtained in an unlawful manner and he said he would. I told him then I would let him know later about these cigarettes. I also asked Mr. Burke if these cigarettes were government cigarettes as I told him I had noticed the mark "P-I-E-R" and "W-A-S-H." I don't remember [94] the answer he made to that question, but from the way I got it I was under the impression at that time that they were out of the same lot. I told them to come back in the evening or



(Testimony of Joe Rosenthal.)

the afternoon and I would let them know. I went to lunch with Mrs. Fitch and while we were at lunch I put in a call over the long distance telephone to San Francisco, to my father, and told him I had an opportunity of buying 21½ million cigarettes at the price of \$4.50 per M. He asked me where I considered the cigarettes came from and I told him I thought they were Government property. I told him the men were satisfactory and would sign a contract guaranteeing these cigarettes were obtained in a legitimate manner and that they were willing to split them up into three payments, and he said under those circumstances he thought it would be all right with the contract. So we had a stenographer draw up that contract. I went back with Mrs. Fitch to the store about two o'clock. Burke came in by himself and signed the contract, and I also signed it. Mr. and Mrs. Fitch signed it as witnesses. Then Burke left and that was the only time I ever seen either of them, Burke or Young, until in court here to-day.

Witness identified Defendant's Exhibit "F" as the contract which is spoken of and said that they were signed in triplicate, that they had been dictated to the young lady at the hotel. That I was in Bakersfield when I had the first intimation that these cigarettes were stolen. It came to me over a telephone call from San Francisco office to our Bakersfield manager before I got down to the store. He was advised that the cigarettes were not to be sold, but were to be held and that the order came from San Francisco. I thought that was funny but didn't

(Testimony of Joe Rosenthal.)

say anything about it until I got back to San Francisco. Whereupon witness identified the different signatures on the different receipts from different stores for tobacco that were turned over immediately after it was found they had been stolen. Whereupon counsel for defendant [95] offered in evidence the receipt which Mr. McShane had identified on trial of the case. They were admitted and the Court stated that he did not think it necessary to read them. Whereupon witness continued: I know nothing about any Fatimas and to my best knowledge there was no money being paid until the contract was made. I knew that Mrs. Fitch entered into a transaction whereby she wrote for a check that was for a prior sale of 25 M Lucky Strike cigarettes.

On cross-examination witness testified in substance as follows:

That there is no tobacco on the paper handed to Mr. Ash upon witness' examination with reference to the Vancouver sale; that witness does not recall having purchased anything from the Government in the way of cigarettes or tobacco during the month of October, 1919; that in November, 1919, he made a bid that I was first speaking about, probably by some sub-jobber who purchased from the Government some time prior to that time. I believe it was last November; I am not positive. These big lots of tobacco from the Government are sub-jobbed, and they are well-known jobbers, some of them, some are not, according to the men that buy them. Large jobbers get notice from the Government of

(Testimony of Joe Rosenthal.)

sales every day with reference to all kinds of goods. We have received lots of notices of tobacco being sold by the Government and possibly received notice of the tobacco being sold by the Government around the months of November, October and September, 1919. I am not certain whether we received any notice at all of any tobacco that was being sold in the State of California amounting to over  $2\frac{1}{2}$  millions of cigarettes. I could not tell whether we received any notice at any time around there of  $2\frac{1}{2}$  millions of Camels, Chesterfields and Lucky Strikes being sold by the Government. I believe we received notices from some sub-jobbers offering goods for sale, from several eastern concerns offering us tobacco that they had bought from the Government, but not in this state. It did not strike me that this was an extraordinary amount or quantity of cigarettes. [96] I thought that Young and La Veque at that time were jobbers. I thought they had bought these cigarettes and wanted to resell them at a profit. We do not necessarily buy merchandise through jobbers. We buy entire stores out and all sorts of goods in that manner, cigarettes, tobaccos and all kinds of merchandise; buy also through jobbers; place bids at public sales. I never had, before this time, purchased  $2\frac{1}{2}$  millions of cigarettes, from anyone but a jobber. One purchase I did buy  $2\frac{1}{2}$  million cigarettes at one time from a jobber, but in a few weeks, in our store, we do. I never in my life, particularly during the year 1919, figured with any jobber for  $2\frac{1}{2}$

(Testimony of Joe Rosenthal.)

million cigarettes. Witness identifies Defendant's Exhibit "G," which is dated October 1, 1919, to Mrs. Fitch, and signed in typewriting by Maurice Rosenthal, and said the first time he saw that letter was after he was indicted, that he kept his father well informed of what was taking place, and makes regular visits to our places of business and knows what is happening thereabouts, but don't get time to inform his father on everything; that he goes from store to store, gets around to them every month. That they haven't a stenographer in their store and don't think that they had a typewriter there when this contract was prepared, and that he drew it up, dictated it to a girl in the hotel. He left those blanks because he did not want anybody to know where he bought these cigarettes, or who was buying them, because he figured they might try and get a contract from these people by paying them a little more probably than we were paying them. As this was a big sale, Mr. Mitau wanted to find out from whom they were getting these cigarettes and wanted to buy them for himself. I did not want anybody to know where we got these cigarettes because I figured they would try to buy them and I figured that Mitau might buy these cigarettes. He wanted to do so. I did not figure on the fact that Mitau would purchase any cigarettes in the condition these were in. I had seen packages of some of these cigarettes before I entered into a contract, [97] but I never really examined them to notice whether the packings looked like this one,

(Testimony of Joe Rosenthal.)

that is, that something had been cut off. I saw them in the store in the night-time. Two and one-half million at \$4.00 per M would make \$11,250.00. That is quite a considerable transaction. Never before had I purchased any cigarettes from anyone in that quantity at that price, but previous to this contract being entered into Mrs. Fitch had already paid about \$3,500.00 worth of cigarettes from these people and everything seemed to be legitimate, so I was well satisfied with their judgment or else I would not have entered into a contract with men whom I did not know. They told me what was in the contract and that they left out Gerber but didn't tell me what business they were in nor where they banked, nor who vouched for them, but the Fitches told me that they considered them responsible. I considered that if they had 2½ million cigarettes, that it was possible they bought 2½ million cigarettes, probably from this Vancouver tobacco and I thought they were sub-jobbing. We haven't a list of every sub-jobber in San Francisco. There were lots of speculators in merchandise coming around every day, probably not with 2½ million cigarettes. I put "2½ million or more" in the contract because they stated that they did not know exactly what they had. They might have 2 million and they might have 2½ million or a little more; I was to take what they had at \$4.50 per M. They said they had in the neighborhood of 2½ millions. They told me the cigarettes were at Marysville. I put in the contract that they lived at Gerber. He gave me his residence



(Testimony of Joe Rosenthal.)

at Gerber, but he said that he had the cigarettes stored at Marysville. I did not ask him how long they had been stored there nor how much he paid for the cigarettes, nor where they had bought them. I asked him for a guarantee that is specified in the body of the contract. Didn't ask him to give any indemnity bond for the faithful performance of the contract. I considered this quite an artful contract and didn't want Mitau or anyone else to know anything about it. It didn't occur to [98] me to ask them to have two persons go on this contract for the faithful performance of it. I made no inquiries at all as to who these two men were. Did not go to my banker to see if he knew who they were; not to anyone. Burke and Young got there in the morning and had the talk with me. Young didn't have any talk. He was in there with Mr. Burke. He objected to some part of the contract. He took an active interest in the matter on these two times. I didn't have his name in the contract because he was not the man who drew the contract. He was not the man who owned the cigarettes or the man that I was doing business with. He did not belong in there and yet he protested in regard to the terms of the contract. The reason I didn't ask him what interest he had in it was that I already had the contract drawn up with the man who owned the cigarettes. I was not there at the time of the first transaction. This contract provides for a bill of sale with each delivery, but we haven't got any such bills of sale. The contract provides for Camels, Lucky Strikes,

(Testimony of Joe Rosenthal.)

and Chesterfields. I didn't ask them whether they had any Omars, Fatimas or Piedmonts and don't know anything about why these were purchased. The 39,000 were purchased outside of our contract. Nothing was specified in the contract about Fatimas, Omars or Piedmonts, but that we were willing to buy them at \$4.50 per M. Fatimas were sold for \$5.00 per M. There is a separate bill for these, they were bought separate from my contract. When they were bought I was at home in the San Francisco office and no part of them applied on the contract. I saw Mr. Young in the store but once and in the morning. I was speaking mostly with Mr. Burke at that time and Mr. Young was present. I have heard since then an occasion where the money was divided in the store between Young and Burke. Whereupon witness produced statement of account with Maurice Rosenthal from John Bollman & Company, dated some time in 1919, and testifies that the price of Chesterfields then was \$6.00 per M, less 10 and 2, and that would be about \$5.30; that the price of other cigarettes, such [99] as Fatimas, were \$8.00 less 10 and 2; that the date of this statement is February 24th, 1919. The price given on these cigarettes might have increased. They did rise and were higher in the month of September, October and November. Whereupon the following questions were asked:

Q. "If you had no idea that these goods were stolen or no indication that they were stolen, why did you put these words in the contract.

(Testimony of Joe Rosenthal.)

A. I put them in as a sort of protection.

Q. How would it protect you?

A. I am not an attorney, I do not know. I thought that it would."

I had no attorney advise me in drawing up that transaction. Drew it up myself. They had purchased a considerable amount of cigarettes from these men before and when I purchased these I put that in as a protection. I thought that it would fully protect me, and it occurred to me that it should be put in there to protect me. I was then buying \$11,250.00 worth of cigarettes at \$4.50 per M; I never purchased any cigarettes at all during the year 1919 from the Government directly. I cannot say that I have or have not seen any packages at any time sold by the Government in the condition these packages are in, I mean with Christmas wrappings on them. I have seen packages sold by the Government in the condition these packages were in. I think they even come in worse condition. They did not have the name of the jobber on them and jobbers have delivered to us packages that did not have a name or address on them. Witness saw package with the words "P-I-E-R" and the one with "W-A-S-H." I stated that I noticed that they had those marks and asked him if they were Government goods and he never answered me and I never inquired further from him. I think I mentioned it to him once about the Government goods that were to be handled, and from the way I got him he left me with the impression that these were some of the same lot, but I could not say

(Testimony of Joe Rosenthal.)

that he did not tell me anything at all about it. Did not purchase any cigarettes from the [100] Government or see that they were purchased from the Government that did not have the Government stamps on them as sold by the Government. The Government had, as I explained before, in the neighborhood of \$180,000 worth of tobacco, and furthermore they had sold a big part of it to whoever bought it, to whomever paid the biggest price. This was in April, 1919. The Government owned these cigarettes on the basis of \$6.00 less 10 and 2 or \$5.30 net, and the Government would not pay more than that, and they sold them at a discount off that price, but did not sell me anything. I knew these cigarettes had been purchased by somebody else, and I figured that these cigarettes were like these which were sold to us. Thought possibly they might have been. I tried to buy them at a less price and I figured that they were part of these goods. Whereupon the following questions were asked:

Q. "Did you ever see any cigarettes that the Government had prepared for export? A. Export.

Q. Yes, for the army of the soldiers, that had the Government stamp on them for export to Vancouver barracks.

A. The Government did not prepare them for export to Vancouver Barracks. They were put there in the hands of the Spruce Production Company and were offered by them for sale."

I knew of other cigarettes that were for sale by the Government during the year 1919 but cannot give

(Testimony of Joe Rosenthal.)

you that from memory. If I went down to our office I could give you any number of lists where the Government offered tobacco all over the country. I never personally carefully examined these cigarettes to see whether or not they had been shipped by any transportation company to either of these men. There was nothing suspicious about these boxes having anything stripped off of them. I never closely examined them. I have bought packages of cigarettes and other things from the Government in the condition in which these packages are in, and I have bought entire stocks of fire goods, stock of goods that are partly burned, and they are all worse than that. Whereupon the following question was asked: [101]

Q. "Did you ever buy any in this particular condition, that is, as far as the names and addresses are concerned; did you ever buy any where the names and addresses were torn off?

A. I have bought them lots of times.

Q. Where? Answer my question.

A. Well, I am trying to.

Q. Did you ever buy 2½ million cigarettes in the condition that those cigarettes are in?

A. No, sir."

WITNESS.—(Continued.) To the best of my knowledge I never saw this letter dated October 1, 1919, until after the indictment was presented in the case. I heard that such letter had been written but I did not see it. My father told me he had written to Mr. and Mrs. Fitch, and told her to investigate who was selling her these cigarettes. That was written



(Testimony of Joe Rosenthal.)

after he had written the check that they had, and then they told me she had answered she was satisfied that the men were honest. At the time I entered into the contract upon October 31st, I knew that other sales had been made to our concern by Young and La-  
Veque.

On redirect examination witness testified in substance: I never saw the cigarettes that the examination is about, these Fatimas. The only cigarettes that I saw physically the first time are when I saw them here. The Fatimas were delivered. I never saw the Fatimas. I never saw any cigarettes that were delivered under the contract.

On recross-examination witness testified in substance, that he saw Lucky Strikes in stores at the time. I don't know whether these are the cigarettes or not. I saw some Camels but do not remember of seeing any Chesterfields. I did not notice with reference to the packages in which they were, whether they were the packages I saw there; with reference to the condition of these packages, that the names torn off of the cigarettes in the same condition as they now are. Whereupon it was [102] stipulated in open court by respective counsel that the date on which the 39 cases were turned over to the Government was on a Tuesday, November 18, 1919.

### **Testimony of Maurice Rosenthal, for Defendants.**

MAURICE ROSENTHAL, a witness called and sworn in behalf of the defendants, testified in substance as follows:

That his name is Maurice Rosenthal and resides at

(Testimony of Maurice Rosenthal.)

San Francisco, California. His business is whole-sale furniture and a general chain of stores; that the name of his business is Maurice Rosenthal and that he does business under the name of the Pacific Sales Company and sales store; that the Pacific Sales Company is owned by him; he is sole proprietor. He knows Joe Rosenthal, his son. Knows Mrs. Lewis and Mr. and Mrs. Fitch. They are all his employees. I have heard all the testimony introduced in this case. All transactions that have been testified to occurred when I was at my office at San Francisco, and I never, at any time, was in Sacramento. I do not know the men known as Young and Burke. I never have seen them until to-day when they were on the stand. Never had any conversation with them. I have been in business for myself and as a partner since 1880, on Sansome Street, over 40 years ago in the same line of business. The conversation with Mrs. Fitch over the telephone was that they had offered us these cigarettes and I handed it over to my son, and asked him what the prices were. My instructions to Mrs. Fitch was that if it is all right, to buy them if she considered everything regular. Whereupon the following questions were asked:

Q. "In other words, if this had been a dishonest transaction, would you have permitted your concern to have anything to do with it. You can answer that yes or no, and then explain. A. No, sir.

The COURT.—If you wish to explain that answer you can do so now. [103]

A. My position—why should I think of buying

(Testimony of Maurice Rosenthal.)

hundreds of dollars worth of cigarettes if it is not legitimate for a few thousand dollars? I had, the first of last month, October, a business of \$365,000.00 in one month. It is ridiculous for me to think of buying or getting anything that is not aboveboard."

I wrote the letter to Mrs. Fitch on October 1st. I dictated that letter and authorized it. I mean by the instructions that "if you have any doubt on the subject, let him take his goods back as I don't want to get mixed up in a disreputable proposition." Just what I said there. I meant exactly what I said. I was not present in Sacramento when these transactions were had and knew nothing about them except the reports which I received. There never was anything at any time from the reports which I got from my people that indicated to my mind that this was a disreputable transaction, or that the goods had been stolen. I believe I received a telephone message or letter from Mrs. Fitch, telling me for the first time the goods had been stolen. I remember Mr. O'Connell and Mr. McShane coming on a visit to me. My groceryman was present when they came in. They came in there early in the morning and my man took them into my office. He is my grocery buyer and he told me about these two gentlemen and he brought them in. As soon as they stated their case, I instructed the telephone girl to telephone to all the different stores where the cigarettes had been sent, to stop the sale if they had received the cigarettes. I think these goods were shipped to 49 Battery Street a day or two before. Before I did anything else I

(Testimony of Maurice Rosenthal.)

notified the telephone girl to stop the sale of them and hold them for disposition by the Government agent. I restored all goods that it was possible to be restored to the Southern Pacific Company. I think I paid out about \$2,000.00. I don't remember exactly how much. I did not, at any time during the period of these transactions, buy these goods or authorize them being bought, knowing that they were stolen. It would have been ridiculous to think of that. I [104] have been forty years in business. There never has been anything against me.

On cross-examination witness testified: I had a telephone message from my son at the Travelers' Hotel with reference to the contract, regarding the 2½ million cigarettes. Joe said these men looked all right; that they had the cigarettes and believed that they came up to quality, and that he thought the cigarettes were from Washington from the Government supply which they had stored there, and I told him that if the price was all right, I would leave that to Joe. I never bought anything in groceries or cigarettes, or anything like that; so I told him if it was all right and the price right, to go ahead. Furthermore, I told him unless they were badly up for money, and this was a large sum of money to talk about, to be careful and see that I got time on it, as it was too much money to be paid at one time. Joe told me that the price of \$4.50 per M was lower than we could have bought them at that time—lower than the regular prices. I wanted to postpone the time of payment because in the first place that

(Testimony of Maurice Rosenthal.)

amount of money is hard to raise and so long as I could get time on it it was much better to purchase that way. That was not an unusually large purchase for me to make. Whereupon the following question was asked:

Q. "Did you ever purchase in the year 1919 2½ million cigarettes from anybody else at one time?"

A. I told you before, I am not buying cigarettes. It is not in my department. I am buying the furnishing goods, clothing and drygoods.

Q. Does the man who is at the head of your department go ahead and you don't know anything what he purchased?

A. Well, I would know something about it—nothing definite.

WITNESS.—(Continued.) I signed checks and sent them up there to Sacramento for cigarettes.  
[105]

Whereupon the following question was asked:

Q. "As a matter of fact, at each purchase, of each different lot of cigarettes, you were notified, were you not, of the purchase of these by Mr. and Mrs. Fitch by telephone or otherwise, authorizing the purchase of each lot.

A. The first one, as you remark, yes, the second one, no, the third one, the letter came with the bill, but you have got my letter there, I think. That is just how it happened."

Whereupon witness continued: That Mrs. Fitch called me on the first sale and I authorized her to pay for them in cash. I don't remember anything



(Testimony of Maurice Rosenthal.)

about the second one. The contract involved a considerable sum of money, but that is an everyday occurrence for me to buy. We buy every day in the year and to give you an idea of purchases, we bought over three million dollars in a year. We did, as I stated before, a business in October of over \$365,000 and in November it was about the same. I did not want to have a contract drawn up covering this matter, although my son rang me up before the contract was signed and I told him to go ahead and buy the goods. I told him to get this time because it involved the payment of \$11,000.00. I thought it was best to delay it if we could get some time on it. In buying a thing you always want to get the best terms you can before you make the deal. I did not authorize my son or tell him to get any guarantee or any bonds, or look up these men and see whether or not the contract could be enforced. Why should I have a bond when I have time on it and have got the delivery of the goods. I did not see the contract and authorized my son to proceed with it. I think I saw the contract afterwards. Mr. and Mrs. Fitch's letter informed me whom they were dealing with. I thought they were dealing with a speculator by the name of Mr. Burke. I never knew Mr. Young. The contract is signed by Mr. Burke. I had a conversation with O'Connell and McShane in my office. I did not inquire of either of them regarding the responsibility of either Mr. Young or Mr. Burke, except that after Mr. McShane had been telling me that these goods [106] were stolen I

(Testimony of Maurice Rosenthal.)

showed them the records, at least I told the office to, told them to look over the records and see how much they amounted to and report it to me. They told me that it was between \$2,500 and \$2,700, and I asked Mr. McShane and Mr. O'Connell, or both of them, if there was any chance of getting any money back from these people, and they told me that one of them had a house in Roseville and they would help me to get back all I could. I then instructed my manager in Sacramento to go to the bank, and I told her to get references and to get an attorney and commence suit against these people. I don't remember which one they told me had the house in Roseville. I don't know which one, Young or Burke, she commenced suit against. I referred it to my manager here, who was more familiar with the case than I was. I cannot say whether or not I brought action against Mr. Young; I left it to my manager. I never wrote any banker here inquiring about these men. I never thought that these cigarettes were stolen, or that they had been obtained illegitimately at any time, and it never occurred to me before that these cigarettes might have been stolen. I wrote this letter as a protection to take. In any event, when buying from a speculator, I want them to take due precaution. I recall the language in the letter: "I am in receipt of yours of September 30th, but before sending you check for \$1,040.00 for these cigarettes we want you to make sure that these cigarettes are not stolen," and it did not occur to me at any time that these cigarettes

(Testimony of Maurice Rosenthal.)

might be stolen. I did not tell Mr. O'Connell or Mr. McShane when they were in my office at that time and asked me about this, that I had sent my son up there to find out whether these goods had been stolen. I may have remarked that my son went up there. I did not tell them I sent him to find out if there was anything wrong about it. I glanced at the contract; did not pay much attention to it. It was in the office possession, in mine. The language, "he also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any federal, state or local law [107] law," is in there, and I recall it just as I stated. I probably thought as I see it there, that I considered the deal transacted. I did not pay any attention to it. I figured that the guarantee in that contract was worth something because, according to that, he delivered his goods without any money and I got that money back, that is in the guarantee. I thought the guarantee was worth something. I positively did not say to O'Connell and McShane, in conversation at the office, that the reason an investigation was conducted was on account of my belief that there was something crooked about the cigarettes on account of the low price at which they were offered for sale. I have no knowledge of saying anything of the kind. Mr. Wirtz is not my manager and was not present at the conversation between McShane, O'Connell and myself and I made no such statement as that. I dictated this letter and sent it out without signing; sent out some of my letters

(Testimony of Maurice Rosenthal.)

without signing them, but authorized my stenographer sometimes to initial them. I never looked at the letter. I don't know, if I did; the letter will speak for itself. In addition to what Mrs. Fitch wrote me, this statement at the bottom signed by Burke, I wanted that at the time from Burke as a guarantee of title. You saw the letter Mrs. Fitch wrote me and she said he was an honest man.

At this point the evidence in behalf of defendants was concluded.

**Testimony of W. E. Van Dorn, for the Government  
(Recalled in Rebuttal).**

W. E. VAN DORN was recalled by the Government in rebuttal and testified in substance as follows:

My company prepared for shipment cigarettes for the army and navy. They did not prepare any packages of this character here. In the first place, any goods that we packed during the year 1919, the goods were packed in wooden cases. The Government never at any time purchased Christmas packed cigarettes. Any goods for export do not contain stamps and most of them are shipped through San Francisco ports. I do not know of any sales that were made in the year 1919, either in [108] California or in Washington. About May of this year we heard that there was to be a sale at Mare Island of some cigarettes, and we found out that some of our cigarettes were being sold in that sale and we immediately sent a man to Mare Island to buy the

(Testimony of W. E. Van Dorn.)

entire stock so that they would not get on the market. On the 24th of February our prices to Mr. Rosenthal were as he has stated. On the 25th Chesterfields jumped to \$7.50 per M and Fatimas to \$9.50 per M. On September 17th we advanced the price on Piedmonts to \$7.35 per M and the next increase came October 21st, which jumped Chesterfields up to \$7.80 per M and the Fatimas at \$9.80 and the Piedmonts \$7.50.

On cross-examination witness testified in substance as follows: The only difference between the home used merchandise and the export is in the packing. There was a difference there. The Government did not use for home consumption certain goods and also used others for export. I do not know what my firm paid for the cigarettes that they bought at Mare Island. Do not know whether there was any reduction. We took them from Mare Island just simply to keep them from getting on the market. Mr. White, the president of our concern, is the only one who knows what he paid for them. I don't know that the goods were purchased at Mare Island at a reduction of 30%. I don't know what they were purchased at by Mr. Whittaker.

The following is a list of exhibits received in evidence in behalf of the respective parties on the trial of said action and the substance of their contents, viz.:

Government's Exhibit No. 1.—Bill of Lading for 42 cases of cigarettes shipped by John Bollman & Company to various consignees in Oregon, dated



November 7, 1919, admitted to be the cigarettes shipped on that date; that 39 of these cases were stolen as shown in the testimony set forth in the bill of exceptions.

Government's Exhibit No. 2.—Railroad Company's waybill of same 42 cases. [109]

Government's Exhibit No. 3.—Copy of contract of sale from Burke to Pacific Sales Company, quoted in this bill of exceptions, being identical with Defendant's Exhibit "F."

Government's Exhibit No. 15.—Photograph of cigarettes received from the Pacific Sales Company, taken at the store of the company at 6th and L Streets, Sacramento.

Government's Exhibit No. 16.—Same as Government's Exhibit No. 15.

Government's Exhibit No. 17.—List of cigarettes and tobacco purchased by Pacific Sales Company.

Defendant's Exhibit "A"—Receipt dated September 12th, 1919, for \$597.00 to Rosenthal and Pacific Sales Company for purchase of 119,400 cigarettes, signed by W. M. McAllister.

Defendant's Exhibit "B."—Copy of check for \$1,040.00 payable to F. W. Burke, dated October 8, 1919, signed by Maurice Rosenthal.

Defendant's Exhibit "C."—Copy of a check for \$922.50 payable to F. W. Burke, dated October 30, 1919, signed by Maurice Rosenthal.

Defendant's Exhibit "D."—Copy of check for \$2,565.00 payable to F. W. Burke dated November 3, 1919, and signed by Maurice Rosenthal.

Defendant's Exhibit "E."—Copy of check for \$467.28, payable to F. W. Burke, dated November 11, 1919, and signed by Maurice Rosenthal.

Defendant's Exhibit "F."—Contract between Pacific Sales Company and F. W. Burke. This contract was read in evidence and is quoted in full in this bill of exceptions and is identical with Government's Exhibit No. 3.

Defendant's Exhibit "G."—Letter dated October 1st from Maurice Rosenthal to Mrs. Fitch, read in evidence and quoted in full in this bill of exceptions.

Defendant's Exhibit "H."—Receipts to Pacific Sales Company for various packages of cigarettes returned to the Railroad Company, or the Government. [110]

None of said exhibits are deemed of any importance in the case except those read in evidence and quoted in this bill of exceptions, and the above statement of the contents of these remaining exhibits is agreed to be the substance of each and all of them, and may be so considered under the statement hereinafter inserted herein that the above and foregoing constitutes the substance of all the evidence introduced on the trial of the case.

Whereupon the evidence was closed and the above and foregoing is the substance of all the evidence introduced in the case.

At the close of the evidence counsel for the respective parties in open court waived argument to the jury and the same was submitted without argument.

Whereupon the Court charged the jury as follows:

**Instructions of Court to Jury.**

Gentlemen of the Jury:

(Orally.) It becomes necessary for me to explain a little more fully than would have been the case if this case had been argued by counsel. You will take this indictment with you into the jury-room at the conclusion of the Court's instructions and will have it for reference during your deliberations.

There are two counts in this indictment. I shall comment on these more than I would have done if the case had been argued. The only difference I see in the two counts of the indictment is that the first count charges that the defendants unlawfully, willfully, knowingly and feloniously bought and received 39 cases of cigarettes, etc., and in the second count they are charged with having unlawfully, willfully, knowingly and feloniously received and having in their possession the cigarettes; the first count is for having bought and received, and the second count is for having received and having in their possession.

Then it goes on and describes the Interstate Commerce character of the shipment, what car they were in and the other details that go with such a transaction, which have been explained to you during the trial. [111]

To this indictment the defendants, and each of them, have entered a plea of not guilty, thereby placing the burden upon the prosecution of establishing, by evidence sufficient to convince you be-

yond a reasonable doubt, the truth of every material allegation of the indictment and the existence of every essential element of the offense, before you can convict the defendants, or any one of them. You will consider each count of the indictment separately; that is to say, you will consider each count of the indictment the same as a separate indictment and you will deliberate upon, and determine separately the guilt or innocence of each defendant upon each count of the indictment. Thus, if you have a reasonable doubt, concerning the guilt of one defendant upon a certain count, that defendant is entitled to the benefit of the doubt, although you may convict other defendants upon that count.

The labor of the Court in instruction you in this case has been materially lessened by the statement made here, and stipulated to, that the goods were stolen and that they were stolen while moving in Interstate Commerce. That is not disputed and it will not be necessary for me to go into what constitutes a shipment in Interstate Commerce.

It is not disputed but that, so far as the first count of this indictment is concerned, some of these defendants doubtless bought and received the goods, and so far as the second count is concerned, that they knowingly received and had them in their possession, that is, certain of the packages.

But that which is disputed and the point upon which evidence has been introduced is whether or not the defendants, or any of them, knew that these goods had been stolen. Now, before you could convict any one of the defendants, you would have to

be satisfied beyond a reasonable doubt that the defendant knew that the goods were stolen, and that he bought, or received, them, or that he had them in his possession with that knowledge. If he only learned subsequent to the purchase or receipt of the 39 cases (I believe there are only 39 charged) that they were stolen, you [112] would not find that defendant guilty under this indictment.

If you have a reasonable doubt concerning a particular defendant, the individual that you are considering at the time, whether or not at the time of the purchase or receipt by him of the 39 cases of cigarettes, that he actually knew that they had been stolen, that defendant is entitled to the benefit of that doubt, and acquittal at your hands; and so, as to each defendant. What a man knows is a process of the mind and you cannot see into his mind, or have it laid open before you. You can only arrive at a man's intent by what he says and does in the light of the circumstances under which he says and does it. This includes his conduct before and after he did it.

In his subsequent statements he may make mistakes and do some very unusual things and yet not be guilty; and when I say that, I have no particular reference to the statements in this testimony. But you will have to determine what he knew at the time he purchased the goods, and his subsequent statements may help to show that, as well as his statements made at the time.

In this case, as in every case where you try to determine what is in a man's mind, you can only de-



termine it by circumstances and the things that surrounded him at the time of the transaction and statements that you are investigating. That is what has been called circumstantial evidence.

You can only determine what a man knows by circumstantial evidence. You can convict a man upon circumstantial evidence just as you can convict a man on direct evidence. A man could come in here and say why he did things or why he didn't do them, but so far as you are concerned, you have got to depend upon circumstantial evidence as to what was in his mind.

Now, there is a rule regarding what is necessary concerning circumstantial evidence before you can convict. All circumstances have to be proven, and all of them must be consistent with the theory of guilt and every one of them must be inconsistent with any reasonable theory of innocence.

The defense in this case evidently relies upon the latter [113] requirement to compel you to return a verdict of not guilty in this case. That is their position, as I understand it, although they have not argued the case; that the business carried on by this firm and the transactions had with these men, and the way they came there, not being in a hurry, and all the other things they have brought out were all circumstances reasonably consistent with the theory of the defendant's innocence, and this is for you to determine. If you so find, then it will be necessary for you to acquit the defendants, but, if you find that these circumstances can only be consistent with the theory of the defendant's

knowledge, and all the other elements of the defense having been established to your satisfaction and beyond a reasonable doubt, it will be necessary to convict the defendant, or defendants, whose case you are considering.

These two witnesses who have admitted that they stole the goods are what is known as accomplices. The law permits the conviction of men on the testimony of accomplices, but it is the duty of the jury to carefully weigh and scrutinize the testimony of the accomplices, more so than in the case of other witnesses. One of the reasons for this is that, where an accomplice has been offered as a witness by the Government, there is a justifiable presumption that he expects some consideration at the hands of the Government. That such expectation is reasonably entertained by these two witnesses is shown by the fact that they have not yet been sentenced.

You understand that the question before you is not whether the manner in which the purchases were made by the defendants was such as would justify a verdict in a civil case against them for the goods, or whether the defendants were negligent in purchasing the goods or made a mistake, but, whether, when they engaged in this transaction, they purchased the goods knowing that they had been stolen. If you are convinced beyond a reasonable doubt that the particular defendant whose case you are considering at the time, did actually know at the time that he purchased or received them, that they were stolen, then, that defendant is [114] guilty; of course all the other elements of the offense

having been established to your satisfaction and beyond a reasonable doubt.

There is no presumption arising against a defendant, or any of them, by reason of his having been brought to trial before you. Every presumption of law is in favor of his innocence and this presumption remains with him throughout the trial and until the Government has introduced evidence sufficient to break it down; overcome it; and has proved beyond a reasonable doubt every material allegation in the indictment and has convinced you by the evidence beyond a reasonable doubt of his guilt.

As I told you before, if you have a reasonable doubt concerning the guilt of any defendant, he is entitled to the benefit of that doubt, and if you have a reasonable doubt as to whether or not the evidence has established the truth of every material allegation in any certain count of the indictment—the count you are considering at the time—he is entitled to the benefit of that doubt.

Reasonable doubt, as used in these instructions, means just what the two words mean. It is such a doubt as would cause a man of ordinary prudence, determination and intelligence to pause or hesitate in one of the more important transactions connected with his own affairs in every-day life. If you have such a doubt concerning any of the material elements and allegations of the charge, as to any defendant on either count, the defendant is entitled to the benefit of that doubt and to an acquittal. If you have no such doubt, then you do not have a reasonable doubt, and then it is your duty to convict.

You are, in this case, as in every other case where questions of fact are submitted to a jury for their determination, the sole and exclusive judges of every question of fact in the case, the credibility of the witnesses and the weight of the evidence. In determining the amount of credit to be accorded to the witnesses coming before you, you will be governed as you are in the ordinary affairs of life. [115]

The law does not undertake to enumerate or point out all the things that you should take into account in determining from the testimony where the truth lies in human transactions, but you should take into account the manner of the witnesses upon the stand, their demeanor, and whether they impressed you as being perfectly candid, fair and truthful, or whether they appeared the contrary. You will also take into account their apparent reluctance in giving their testimony, or whether they appeared to be too willing, running along and getting ahead of the story and telling things that nobody has asked them about; also you will take into account the testimony of each witness by itself, whether it appears reasonable and probable in the light of the circumstances, or whether it appears unreasonable and unlikely; whether it is corroborated by other evidence where you would expect it to be corroborated, if it were true, or whether it is contradicted by other evidence. Also you will take into account the situation in which each witness was placed, as enabling him to actually see and know the things about which he has testified, as one witness might be much more

favorably situated, as enabling him to know what took place than another, equally anxious to tell the truth. This would be particularly true regarding the question of knowledge of the goods having been stolen, whether the witness actually knew the facts or whether he should have known them, in view of the circumstances.

You will apply to the testimony of each defendant the same rule that you apply to the testimony of the other witnesses, including their natural interest in the result of the case.

Is there anything further before the jury retires?

Mr. WACHHORST.—We are satisfied.

Mr. McMILLAN.—The Government is satisfied.

The COURT.—The form of verdict that you will take into the jury-room reads as follows: “On the first count of the indictment, we find Joseph Rosenthal blank guilty; Maurice Rosenthal, blank guilty; and Arthur F. Fitch, blank guilty; and the same as to the second count. If you find a defendant guilty on either [116] count, that is, either defendant on either count, you will fill in the word “is” before the word “guilty”; and if you find a defendant not guilty on either count, you will write in the word “not” before the word “guilty” of that particular count for that particular defendant, and so on until the verdict is completed.

The Court will remain here until 5 o'clock, and after that, when the jury comes in, it will only be a matter of a few minutes for me to come here from the hotel.

You may retire.



Whereupon and at 4:37 P. M. the jury retired to to their jury-room in charge of the proper bailiffs, and the Court announced a recess until the jury had agreed upon a verdict.

The jury returned into court at 7:40 P. M.

The COURT.—Let the record show the jury are all present. Gentlemen, have you agreed upon your verdict?

FOREMAN DAVENPORT.—Your Honor, we have.

The COURT.—Please give me your verdict.

Gentlemen, listen to your verdict as it stands recorded: “We, the jury, in the above-entitled case, find as follows: On the first count of the indictment, Joseph Rosenthal, not guilty; Maurice Rosenthal, not guilty; Arthur Fitch, not guilty. On the second count of the indictment, Joseph Rosenthal is guilty; Maurice Rosenthal is not guilty; and Arthur Fitch, not guilty. Signed by Elyse E. Davenport, foreman.” Ladies and gentlemen of the jury, do you say, one and all, that is your verdict?

The JURY.—We do.

The COURT.—Gentlemen, is there anything further before the jury is discharged?

Mr. WACHHORST.—There is nothing further.

Mr. McMILLAN.—There is nothing for the Government.

The COURT.—Very well, the verdict will be received as the verdict in this case, and the jury is discharged from further consideration of the case.

Whereupon, the defendant moved to set aside the verdict and grant a new trial on the ground and for the reason of the insufficiency of the evidence to sustain the verdict and that said verdict was inconsistent with the testimony of the case and that there was not sufficient testimony to sustain the verdict, but the Court overruled such motion, to which ruling the defendant then and there duly excepted.

Thereupon the Court entered judgment upon the verdict and sentenced defendant to be imprisoned for the period of one year and one day in the United States Penitentiary at McNeil Island, State of Washington, to which ruling and judgment of the Court the defendant by his counsel then and there duly excepted.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every part and is hereby settled, allowed, signed and ordered filed and made a part of the record in this case, all within the time allowed by the statutes and by orders of the Court duly made extending said time.

Dated this 4th day of March, 1921.

EDWARD E. CUSHMAN,  
Judge.

[Endorsed]: Filed Mar. 9, 1921. W. B. Maling,  
Clerk. By Thomas J. Franklin, Deputy Clerk.  
[118]

**Certificate of Clerk U. S. District Court to Transcript on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 118 pages, numbered from 1 to 118, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of the United States of America v. Joseph Rosenthal et al., numbered 586, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with praecipe (a copy of which is embodied in this transcript) and the instructions of the attorneys for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error, is the sum of Fifty-eight Dollars and Forty Cents (\$58.40), and that the same has been paid to me by the attorney for plaintiff in error herein.

Annexed hereto is the original citation on writ of error (pages 122 and 123), and the original writ of error (pages 120 and 121), with the return of the said District Court to said writ of error attached thereto (page 121).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 29th day of March, 1921.

[Seal]

WALTER B. MALING,

Clerk.

By Thomas J. Franklin,

Deputy Clerk. [119]

**Writ of Error.**

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph Rosenthal, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Joseph Rosenthal, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to

the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by:

WM. H. HUNT,  
United States Circuit Judge. [120]

Receipt of a copy of the within writ of error is hereby acknowledge, this 21st day of January, A. D. 1921.

FRANK M. SILVA,  
United States Attorney.  
By R. B. McMILLAN,  
Asst. U. S. Attorney.

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### **Return to Writ of Error.**

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, to



the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]                      WALTER B. MALING,  
Clerk U. S. District Court, Northern District of  
California.

By Thomas J. Franklin,  
Deputy Clerk.

[Endorsed]: No. 586. In the Northern Division of the United States District Court for the Northern District of California. Joseph Rosenthal, Plaintiff in Error. vs, United States of America, Defendant in Error. Writ of Error. Filed Jan 22, 1921. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk. [121]

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### **Citation on Writ of Error.**

UNITED STATES OF AMERICA—ss.

The President of the United States to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Northern Division, wherein Joseph Rosenthal is plaintiff in error, and you are defendant in error, to show

cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Judicial Circuit, this 20th day of January, A. D. 1920.

WILLIAM H. HUNT,  
United States Circuit Judge. [122]

Received a copy of the within citation, January, 20, 1921.

FRANK M. SILVA,  
U. S. Attorney,  
By R. B. McMILLAIN,  
Asst. U. S. Atty.,  
For the U. S. Attorney.

[Endorsed]: No. 586. In the Northern Division of the United States District Court, for the Northern District of California. Joseph Rosenthal, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 22, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

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[Endorsed]: No. 3669. United States Circuit Court of Appeals, for the Ninth Circuit. Joseph Rosenthal, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the

Northern Division of the United States District Court of the Northern District of California.

Filed March 29, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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United States Circuit Court of Appeals, Ninth Circuit.

JOSEPH ROSENTHAL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to and Including April 1, 1921, of Return to Writs of Error.**

Good cause appearing, therefore ORDERED that the return to each of the two writs of error, heretofore issued in the above action, is hereby extended to and including the first day of April, 1921.

WM. H. HUNT,  
Circuit Judge.

Dated February 2d, 1921.

[Endorsed]: No. 3669. United States Circuit Court of Appeals, Ninth Circuit. Joseph Rosenthal, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time (Apr. 1, 1921) of Return to Writs of Error. Filed Feb. 3, 1921. F. D. Monckton, Clerk. Re-filed Mar. 29, 1921. F. D. Monckton, Clerk.

